UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 18-23538-rdd

- -x

In the Matter of:

SEARS HOLDINGS CORPORATION, et al.,

Debtors.

- -x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, New York 10601

August 2, 2019

10:08 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

18-23538-rdd Sears Holdings Corporation, et al.

Ch 11

HEARING re Statement/Notice of Assumption and Assignment of Additional Designatable Leases [ECF No. 3298]

HEARING re Objection to Cure Amount for Store #1008 Filed by Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC, and East River Group, LLC [ECF No. 1837]

HEARING re Supplemental Cure Objection and Reservation of Rights (Store #1008) Filed by Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC, and East River Group, LLC [ECF No. 3477]

HEARING re Declaration of Izek Shomof in Support of Supplemental Cure Objection and Reservation of Rights (Store #1008) Filed by Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC, and East River Group, LLC [ECF No. 3478]

HEARING re So Ordered Stipulation and Order By and Among Sellers, Buyer, and Landlord Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC, and East River Group, LLC (I) Extending Time Under 11 U.S.C. § 365(d)(4) for Assumption or Rejection of Lease of Nonresidential Real Property [ECF No. 3817]

HEARING re So Ordered Stipulation and Order By and Among Sellers, Buyer, and Landlord Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC and East River Group, LLC (I) Extending Time for Assumption or Rejection of Lease of Nonresidential Real Property and Setting Briefing Schedule [ECF No. 4186]

HEARING re Transform Holdco LLC's Reply in Support of Assumption and Assignment of Designated Lease for Store Located at 2650 East Olympic Boulevard, Los Angeles, California [ECF No. 4489]

HEARING re Landlord's Reply to Transform Holdco LLC's Reply in Support of Assumption and Assignment of Designated Lease for Store Located at 2650 East Olympic Boulevard, Los Angeles, California" [ECF No. 4624]

HEARING re Declaration of Izek Shomof in Support of Landlord's Reply to Transform Holdco LLC's Reply in Support of Assumption and Assignment of Designated Lease for Store Located at 2650 East Olympic Boulevard, Los Angeles, California [ECF No. 4625]

Transcribed by: Lisa Beck, Jamie Gallagher and Pamela Skaw

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorneys for Debtors and Debtors in Possession
767 Fifth Avenue
New York, NY 10153

BY: JACQUELINE MARCUS, ESQ. (TELEPHONICALLY)

SULMEYER KUPETZ P.C.
Attorneys for the Landlord
333 South Grand Avenue
Suite 3400
Los Angeles, CA 90071

BY: DAVID S. KUPETZ, ESQ.

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for Transform Holdco LLC and Its Affiliates
One Liberty Plaza
New York, NY 10006

BY: ANDREW WEAVER, ESQ.
KATE MASSEY, ESQ.

P R O C E E D I N G S

THE COURT: All right. Good morning. In re Sears Holdings Corp.

MR. WEAVER: Good morning, Your Honor. Andrew Weaver, Cleary Gottlieb, on behalf of Transform.

THE COURT: Good morning.

MR. WEAVER: This morning we have a lease assumption cure objection matter before Your Honor. The landlord does have a declarant who will be crossed in the courtroom. And then the parties will have argument.

There is a little evidentiary issue with some of the exhibits. We're happy to address now, Your Honor, or after the cross of the witness, whatever your preference.

THE COURT: Well, I have two binders, one of which is the parties' joint exhibits.

MR. WEAVER: Correct, Your Honor.

THE COURT: So the admissibility of those is agreed?

MR. WEAVER: Correct, Your Honor.

THE COURT: Okay.

(Joint Exhibits received in evidence)

MR. WEAVER: And then I have a binder labeled "Landlord's Exhibit List". I don't know whether all of these are objected to or just some of them?

MR. WEAVER: They are. They're buckets, Your

Honor, which I can quickly summarize for you.

THE COURT: Okay.

MR. WEAVER: So, Your Honor, looking at Landlord's Exhibits -- 1, in particular, is a summary document. And presumably, it's being submitted under Rule 1006. Just by a quick glance at the document, there are some errors in the document based upon the evidence that the party -- landlord had submitted. And so, we just don't think the document is necessarily reliable.

The second bucket, Your Honor, relates to --

THE COURT: Well, on that point --

MR. WEAVER: Yeah.

THE COURT: -- if you correct the errors, is it then reliable --

MR. WEAVER: Well --

THE COURT: -- or you just haven't had the chance to do the due diligence and therefore it's --

MR. WEAVER: You know, we got this on Friday, Your Honor, so it's been a week. But -- so we really haven't done a thorough due diligence. Look, obviously, Your Honor can -- capable of looking at the evidence. We appreciate that and can disregard what you deem to be not liable. But we just found not having really -- it tied out to anything in particular, we found to be a little bit problematic.

THE COURT: Okay.

MR. WEAVER: That relates, Your Honor, to the second bucket which is Landlord Exhibit 2, 3 and 4. These are invoices and checks which presumably are the backup for number 1. And these documents, Your Honor, were provided for the first time on Friday as part of the surreply and attached to the declaration. We served discovery in May in this case. We deposed their declarant in June in this case. And we just now, a week ago, received the materials.

Again, as a general matter, we find this to be parol evidence that you don't need to get to because the contracts, we think, are clear, Your Honor. But we just believe that, as a procedural matter, that's improper when they were clearly called for in discovery. We had a deposition and then we get these documents at the eleventh hour.

THE COURT: Okay.

MR. WEAVER: The next bucket, Your Honor, is Landlord Exhibit 5, 6, 7, 8, 9 and 10. These are e-mails, Your Honor, that, if you look at them all, they are all e-mails that were forwarded by the landlord to his counsel that has a commentary at the beginning of each -- of the forward chains. But the timing is also the issue, Your Honor. The deposition took place on June 24th in L.A. All of these e-mail chains were sent either during the deposition or after the deposition to counsel. So we did

receive them. They were produced a couple days later to us. But the point of the deposition, Your Honor, was to ask questions about the evidence they're relying upon. And a significant portion of the evidence they want to rely upon now are documents that they found during and after the deposition and forwarded it along. So we think, again, procedurally, Your Honor, that is improper beyond the parol evidence issue. And the mere fact that there is commentary at the start of many of these chains, Your Honor, would not make these appropriate exhibits for evidence in this matter.

THE COURT: Well, I can always disregard the commentary.

MR. WEAVER: Absolutely, Your Honor. Your choice.

THE COURT: Okay.

MR. WEAVER: And then the next bucket, Your Honor, is Exhibits -- Landlord's Exhibits 11, 12, 13, 14 and 15 -- I'm sorry -- through 14. These are photographs that, again, we were just given on Friday. The only backup for these photographs is that the declarant said they were taken at his direction. Again, these would be clearly responsive to discovery. We didn't get a chance to depose the witness on this information. Again, I don't think it's probative at all in any way, Your Honor, but, again, this seems procedurally improper.

THE COURT: Okay.

MR. WEAVER: And I believe Landlord Exhibit 15 is another summary document. This relates to certain wire transfers. I don't think the wire transfers are in dispute here, Your Honor. We just don't know where this document really is sourced from. Frankly, if this were admitted, we don't think we would have a serious concern but, again, it's just from a procedural standpoint.

And then finally, Exhibit 16 is also a summary document. This was attached earlier to a supplemental cure objection in May. There was no backup. Presumably this ties to Exhibit 1 as well and presumably ties to the invoices we've just received. But again, I'm just not sure without much more sourcing than that that it's reliable under the rules, Your Honor.

THE COURT: Okay. All right. Was there an agreement on discovery just to when it would be provided? When was the discovery request made?

MR. WEAVER: Your Honor, the discovery request was made on May 17th. And there was an agreement to produce on June 17th, a week before the deposition. I can read you the discovery request, Your Honor, but they are as you would imagine, the documents they relied upon to support their cure claim.

THE COURT: Okay.

MR. KUPETZ: Good morning, Your Honor. David

Kupetz with SulmeyerKupetz, appearing on behalf of landlord which is the Shomof trust, Vegas Group and East River Group.

THE COURT: Good morning.

MR. KUPETZ: Your Honor, with respect to these evidentiary objections, I'd like to first, if the Court will allow, address Landlord's Exhibits 5 through 10 because that has some carryover with respects to some of the other issues.

Those requests were not covered in any way by Transform's discovery documents and -- request document which I have if the Court would like to look at it. I have copies of Transform's discovery requests. It became only apparent during Mr. Shomof's deposition on June 24th. And, of course, Mr. Shomof is present in the courtroom, Your Honor, because he's the declarant and can be cross-examined.

It became only apparent for the first time that these e-mails were relevant to show, of course, the performance. Certainly, that was never an issue raised by Sears. The landlord had been working with Sears. Part of the argument here is --

THE COURT: Can I see the discovery request?

MR. KUPETZ: Yes, Your Honor. May I approach?

THE COURT: Sure.

(Pause)

THE COURT: Okay. You can go ahead.

MR. KUPETZ: So these e-mails were produced in real time, a good portion of them, actually during the deposition because during the deposition for the first time it became apparent to myself and to the landlord that Transform was taking a position different from Sears that this April 1st, 2017 completion deadline was the real deadline date that hadn't been modified by the course of performance by the parties. And therefore, we had these messages forwarded immediately. And we handed what we could during the deposition. Given the timing -- I think the deposition ended at 3:15 p.m. or something like that. A number of these messages were located very quickly by my client's representatives who weren't at the deposition. There were several that were at the deposition besides Mr. Shomof. And there were then subsequent messages that were discovered in the next couple of days were then uploaded to ShareFile. And they were used in the declaration as exhibits in the same form as they were produced to Transform. And the Court can disregard the forwarding message. I'd ask the Court to disregard that forwarding message. There's no real substance there. We're not intending -- it's not like a jury or something where there's going to be some influence.

Also, the parol evidence rule does not apply as set forth in the reply, which is ECF number 4624 at page 5.

Under California law, which the parties concede is the governing law here, "Course of performance can supplement, qualify or modify contrary terms in a contract." And as the district court said in the Facebook case, and that's cited at page 5 of the reply: "California case law recognizes that course of performance evidence is allowed to explain or supplement integrated contracts" --

THE COURT: Right. Not modify.

MR. KUPETZ: No. It does talk about modify as well. But it explains supplement or modified. The quote there, though, is "explain or supplement integrated contracts" --

THE COURT: Right. Exactly.

MR. KUPETZ: -- "even when the contract" --

THE COURT: Listen, I will hear from the other side where their course of performance issue as far as the rights to the money and the deposit was raised at any time before the June cut off --

MR. KUPETZ: Understood.

THE COURT: -- date.

MR. KUPETZ: Understood, Your Honor. Just in terms of procedurally, how this worked, as the Court, I think, is aware, all that -- when the landlord filed its original cure objection and the supplemental cure objection, all we saw was the amount set forth --

THE COURT: Which was zero.

MR. KUPETZ: -- for the cure was zero.

THE COURT: I understand. But I don't know if there were discussions about -- or if people just went right to discovery. So were there discussions about the escrow -- the deposit? It's actually not held in escrow, right? Is there an escrow agent?

MR. KUPETZ: There is not, Your Honor.

THE COURT: So it's just a deposit.

MR. KUPETZ: The agreement --

MR. WEAVER: A deposit, Your Honor.

MR. KUPETZ: -- contemplated an escrow agent but then the parties between themselves agreed never to use an escrow agent.

THE COURT: All right.

MR. KUPETZ: So the --

THE COURT: So was there a discussion about the -- what happened to the escrow -- the timing issue, et cetera, before the June 17 cutoff date?

MR. WEAVER: Your Honor, there was not really substantive discussions amongst the parties --

THE COURT: Right.

MR. WEAVER: -- as to the legal matters. No, there weren't.

THE COURT: So I'll admit those documents over the

objection that they were produced late. As far as their use and their admissibility, I'll wait to hear the rest of the evidence --

MR. KUPETZ: Okay. Thank you, Your Honor.

THE COURT: -- as far as how they might be used if at all.

MR. KUPETZ: Understood, Your Honor.

THE COURT: Okay.

MR. KUPETZ: With respect to Landlord's Exhibit 1, it's really presented as an illustrative summary. It's referenced in paragraph 16 of the Shomof declaration, ECF number 4625. The invoices and checks are referenced in paragraphs 30 and 31 of the declaration.

THE COURT: All right. But if it doesn't foot, it's really not helpful. It's actually not -- to the opposite. It's potentially prejudicial. So you tell me that the underlying documents are in evidence. We'll just rely on those.

MR. KUPETZ: And with respect to Exhibits 2, 3 and 4, those are copies of the underlying documents that are referenced in Exhibit 1 and are also referenced in paragraph 16 of the Shomof declaration, ECF 4625.

THE COURT: Right. But I think this was a post-discovery cutoff date objection, too. So were other invoices produced and not these?

MR. KUPETZ: I think the other invoices were produced. It was not any intent to omit any. There may have been a couple that weren't produced previously. It wasn't by -- it certainly wasn't by design.

THE COURT: Okay. Well, I've not reviewed these three exhibits. If they are not admitted -- I mean, they're part of the cure claim, right? They serve a base for the cure claim? What is the --

MR. KUPETZ: There are some underlying --

THE COURT: What are the invoices for?

MR. KUPETZ: They're underlying backup material that shows -- may not be necessary but underlying backup material that shows the work that was done and then billed to the landlord for which the landlord seeks reimbursement from --

THE COURT: But work done in connection with what?

MR. WEAVER: Your Honor, I think to that question's very clear. This is for work that was done, invoiced and paid by the tenant. That's what the declaration says. And if you want, Your Honor, we can cross on this and you can decide whether or not they're admissible.

THE COURT: I'll decide when I hear --

MR. WEAVER: Okay. It's based --

MR. KUPETZ: Your Honor, just --

THE COURT: No. I'm not going to rule on this now. I'll decide when we have the examination.

MR. WEAVER: Thank you, Your Honor.

MR. KUPETZ: I think the only additional ones --

THE COURT: Photographs --

MR. KUPETZ: Yeah.

THE COURT: -- and the two charts.

MR. KUPETZ: Right. So the photographs are really just -- they're illustrative of the testimony that appears in paragraphs 33 and 34 of the declaration. And just shows the Court exactly what the declarant is speaking of there. He had these photographs taken under his direction.

THE COURT: I don't think I need them. I think they're irrelevant.

MR. KUPETZ: Okay.

THE COURT: So I'll exclude those.

MR. KUPETZ: And then with respect -- I think the remaining ones, Your Honor, Exhibit 15, I believe --

THE COURT: Right. To the extent it's relevant, I'll admit this.

MR. KUPETZ: I mean, I think I heard counsel they didn't really have an objection but I may have misheard.

THE COURT: Yeah. Well --

MR. WEAVER: There's no debate, I think, Your Honor, that money came in, some money came out. I don't

think --

THE COURT: And there are no issues about inaccuracy on this one, right?

MR. WEAVER: Correct.

THE COURT: All right.

MR. WEAVER: Yeah. I just don't know the source of it, et cetera. I just think to the extent the parties are not debating the fact that money came in and some money came out, I don't think it's necessarily --

THE COURT: Well, this has a specific dollar figure attached to it, right?

MR. WEAVER: Correct, Your Honor. I don't think the dollar amount is in dispute. I think --

THE COURT: It's not. Okay.

MR. WEAVER: For what was deposited and what has been paid to the landlord by the tenant, there's no debate about that, Your Honor.

THE COURT: All right. So that's fine. So this is admitted now.

MR. KUPETZ: And, Your Honor, the final one is Exhibit 16 which is a document that came from the supplemental cure objection which is ECF 3477. And what it does is it just provides a detail breakdown of the supplemental cure amount of 5,696,000 which is set forth as well in the declaration in less detail. This provides a

breakdown of the various categories.

THE COURT: But I don't have the actual invoices or checks or anything like that.

MR. KUPETZ: I'm not sure. I think that's right but I have to --

THE COURT: So I can't admit a summary of something that's not in the record. So that one's out.

So just to summarize then, Exhibit 1 in this landlord exhibit list is not admitted. The Exhibits 2 through 4 I'll determine as far as how they'll be used, if at all, but otherwise would be admitted.

(Landlord's Exhibits 2 through 4 conditionally received in evidence)

THE COURT: The e-mails in 5 through 9 are admitted except for the commentary which I'll disregard. I'm sorry. 5 through 10. Excuse me.

(Landlord's Exhibits 5 through 10 received in evidence)

THE COURT: And then 11 through 14 are not admitted. 15 is admitted and 16 is not admitted.

(Landlord's Exhibit 15 received in evidence)

MR. KUPETZ: Thank you, Your Honor.

THE COURT: Okay.

MR. WEAVER: Thank you, Your Honor.

MR. KUPETZ: Your Honor, if the Court will allow, I'm prepared to present Mr. Shomof and -- again, if the

Court will allow, have his declarations admitted as his -- or adopted as his direct testimony.

THE COURT: Okay. That's fine. And just to be clear, those are the May 1, 2019 declaration and the July 26, 2019 declaration? Are those the two? They're in my binder. It's not an exhibit binder but it's the hearing binder. They're tabs --

MR. KUPETZ: Yes.

THE COURT: -- 2 and 6.

MR. KUPETZ: Definitely the July 26th.

THE COURT: I'm sorry. 3 and 6. Excuse me. Not 2. 3 and 6.

MR. KUPETZ: Yeah. That's correct, Your Honor.

THE COURT: Okay. So do you want to cross-examine Mr. Shomof?

MR. WEAVER: I do, Your Honor.

THE COURT: All right. So can you take the stand?

(Pause)

THE COURT: Would you raise your right hand, please?

IZEK SHOMOF, WITNESS, SWORN

THE COURT: And would you please spell your name for the record?

THE WITNESS: Good morning, Your Honor. My name is Izek Shomof, I-Z-E-K, Shomof, S-H-O-M-O-F.

THE COURT: Okay. Now, Mr. Shomof, you submitted two declarations in support of what I'll refer to as the landlord's objection. It's the Izek Shomof/Aline Shomof Irrevocable Children's Trust, Vegas Group, LLC and East River Group, LLC but I'll refer to them as the landlord.

So you submitted two declarations in support of the cure objection to -- in connection with the motion to assume and assign the lease of the store in Los Angeles.

The first declaration is dated May 1, 2019 and the second is dated July 26, 2019. You recall both of those declarations?

THE WITNESS: I do.

THE COURT: Sitting here today knowing that they would constitute your direct testimony in this contested matter, do you still want that to be your direct testimony?

THE WITNESS: Yes.

THE COURT: And is there anything that you would change in them knowing that it would be your direct testimony?

THE WITNESS: Yes.

THE COURT: Okay. And what would that be?

THE WITNESS: What --

THE COURT: What would you change?

THE WITNESS: No. I do not need to change.

THE COURT: There's nothing that you would --

THE WITNESS: No change.
THE COURT: -- change --
THE WITNESS: No.
THE COURT: -- as your direct testimony.
THE WITNESS: So --
THE COURT: Okay. All right. So I will admit each of them as Mr. Shomof's direct testimony.
(Declaration of Izek Shomof dated May 1, 2019 received in evidence)
(Supplemental declaration of Izek Shomof dated July 26, 2019 received in evidence)
MR. WEAVER: Your Honor, I have a cross binder for the witness and Your Honor, if I may approach?
THE COURT: Okay.
MR. WEAVER: Thank you, Your Honor.
THE COURT: Uh-huh.

CROSS-EXAMINATION

BY MR. WEAVER:
Q Good morning, Mr. Shomof.
A Good morning.
Q I want to start with the construction estimate deposit. And so this is tab 6 in your binder. This is the 2015 amendment. And looking just in general on pages 3 and 4 and 5, under this amendment, you agreed, Mr. Shomof, to perform work related to low voltage services, HVAC, plumbing,

façade, signage and freight elevators. Correct?
A Now let's go back for a second. You said page --
Q I'm sorry, Mr. Shomof. In tab 6, if you look -- you know, it's a little easier if we use the ECF pages. So at the top of the page, you'll see page 16 of 135. You see that?
A Page 16?
Q Of 135 at the top.
A Okay.
Q And you'll see that there's page 17 of 135 at the top and page 18 of 135 at the top. Do you see that?
MR. WEAVER: Your Honor, may I just --
THE COURT: So it's paragraphs 3 through --
MR. WEAVER: 3 through 10.
THE WITNESS: 16 of 135. Yeah, I do see it.
THE COURT: 3 through 10.
MR. WEAVER: Okay.
THE COURT: Okay.
BY MR. WEAVER:
Q So under this 2015 amendment, Mr. Shomof, you as a landlord agree to do work related to low voltage, HVAC, plumbing, façade, signage, seismic work and freight elevators. Correct?
A Correct.
Q And under this agreement, you as a landlord agreed to

complete this work by April 1st, 2017, correct?
A Yes.
Q And you did not complete all of that work by April 1st, 2017, correct?
A We did not due to the agreement that we had with Sears that it should continue.
Q Mr. Shomof, my question is you did not complete the work by April 1st, 2017. Correct?
A Correct.
Q Now if you turn to paragraph 25, Mr. Shomof, and this is found on page 28 of 135, again, still in tab 6, and under this agreement, you as a landlord provided the tenant with a $3.25 million construction estimate deposit. Correct?
A Yes.
Q And that was to "partially secure Landlord's design, repair, construction and completion obligations under [the] amendment". Correct?
A Correct.
Q Now if you turn the page to subparagraph (d), Mr. Shomof, also under this agreement, you agreed, under Section (d), "In the event Landlord does not complete the work contemplated in Sections 3, 4, 6 and 7" -- so that relates to low voltage, HVAC, façade and signage -- "by April 1, 2017, the remainder of [the] funds in the Construction Fund Escrow shall be released to [the] Tenant, at Tenant's

election, so that [the] Tenant [may] cause...work to be completed and [that] Tenant [may] be entitled to payment[s] by [the] Landlord [of] any additional amounts necessary to complete the work."

You agreed to that. Correct, Mr. Shomof?

A We agreed to the tenant election but tenant did not elect for me to stop work and they will continue the work.

Q Mr. Shomof --

A The tenant election was to ask to proceed with the work after April 1st.

Q My question is, Mr. Shomof, you agreed to this provision, correct?

A Yes.

Q And also you agreed that, under this provision, to the extent that you the landlord timely complete the work in a manner that's acceptable to the tenant "any remaining Construction Estimate Deposit[s]" will be dispersed to you subject to review and approval. Correct?

A Correct.

Q Now, Mr. Shomof, the parties -- that is, the landlord and the tenant -- did not enter into a written agreement to adjust the April 1st deadline, correct?

A Not exactly correct, no.

Q Is there a written agreement between the landlord and the tenant to adjust the April 1st deadline? Yes or no, Mr.

Shomof?
A It's not a yes or a no question. There is an e-mail from Delores allowing us to proceed with the work after April 1.
Q We're going to come to that e-mail. I think it's in May of 2017. But what I'm asking, Mr. Shomof, is there a document --
A Yeah. It's a month later.
Q Is there a document signed by you the landlord or your representative and the tenant that adjusts the April 1st deadline? Yes or no?
A A signed agreement, no, but there is an e-mail that's allowing us --
Q Thank you, Mr. Shomof.
Now, Mr. Shomof, you attached to your declaration a number of invoices that you claim that you as the landlord sent to the tenant and that the tenant then subsequently paid. Is that correct?
A Correct.
Q Okay. We'll look at a few of those if we could. So if you'd turn to tab 7, Mr. Shomof -- I'm sorry. Not tab 7. If you look to tab 8 -- I apologize. Tab 8, Mr. Shomof. This is Joint Exhibit number 4 which was the Exhibit number 2 to your declaration. Now this, Mr. Shomof, is an invoice dated August 16th, 2017, invoice number 08001PR, in an

amount of just north of 1.5 million. Correct?
A Correct.
Q Okay. If you turn to tab 9, Mr. Shomof, this is Joint Exhibit 5, number 3 to your declaration. This here is another invoice also dated April (sic) 16th, 2017. It's also invoice number 08001PR. But this is in the amount of 478,000, correct?
A Correct.
Q And on this document is a paid stamp of 8/12/17, correct?
A Correct.
Q If you turn the page, Mr. Shomof -- this is still within that tab -- you'll see yet another invoice also dated August 16th, 2017, also numbered 08001PR, again in the amount of 478,000 but this has a paid stamp of 8/18/17. Correct, Mr. Shomof?
A Are we looking at the same invoice copied twice?
Q Mr. Shomof, this is attached to your declaration. I'm just asking you if this is the evidence that you've submitted to the Court.
A Yes. Yes.
Q Now, Mr. Shomof, if you turn to tab 10, tab 10 is Joint Exhibit 6, number 4 to your declaration. This is another invoice dated August 16th, 2017. This one is invoice number 08002PR. And this has a number -- amount just north of one

million dollars. Correct?
A Correct.
Q If you turn to tab 11, Mr. Shomof, this is Landlord Exhibit number 2, another invoice dated August 16th, 2017. Again, the number 08002PR, but this one's in the amount of 983,000. Correct?
A Correct.
Q And finally, Mr. Shomof, if you look at tab 12, this is Joint Exhibit 7, number 6 to your declaration, another invoice from August 16th, 2017. This one is numbered 08002A. And this is in the amount of $18,853, correct?
A Correct.
Q Okay. Now in addition to these invoices, Mr. Shomof, you also attach to your declaration a set of backup invoices and checks, correct?
A Correct.
Q And this is a backup, the invoices and checks, that went to you or paid by you that were the backup for invoices you sent to Sears that Sears then paid, correct?
A Correct.
Q Now, Mr. Shomof, they were Exhibits 5, 8 and 10 to your declaration. They're Landlord Exhibits 2, 3 and 4. There's approximately 300 pages here, Mr. Shomof. You're familiar with these documents, correct?
A I am -- I have not reviewed every -- each of the

document.
Q You attached this to your declaration, did you, Mr. Shomof?
A Yes, but not in detail. Yes.
Q And you swore under oath that this was the backup for those invoices, correct?
A Correct, yes.
Q Mr. Shomof, how many of these invoices and checks are dated after April 1st, 2017?
A I am not sure.
Q You're not sure.
A No.
Q Well, I just received these on Friday but we've gone through these, Mr. Shomof. And I can represent to you that only 14 of these invoices are dated after April 1st, 2017. Do you have any reason to doubt that representation?
A I just don't remember it but I shall review it again.
Q And those 18 add up to less than $80,000. Again, any reason to doubt that representation?
A Could very much be.
Q Okay. And some of these invoices, Mr. Shomof, date back to 2014, correct?
A Yes.
Q And some of them date back to 2015, correct?
A Correct.

Q And there are no invoices in the backup you provide to this Court dated after 2017, correct?
A There are.
Q Invoices within these three exhibits, Mr. Shomof?
A Invoices from my company to Sears.
Q Understood. I'm not asking about the single-page invoices that you sent to Sears. I'm talking about the backup, the work that was actually done. There are no invoices submitted to this Court dated after 2017, correct?
A The work that we have done and a third party that have done work, but there is other work that we have done that our labor worked and we billed Sears for it.
Q Mr. Shomof, you testified -- in your declaration, you wrote that this is the backup for the invoices that you submitted to Sears that Sears has paid. Correct?
A Correct.
Q Thank you.

Now let's look at that e-mail that we were talking about. It's tab 15 in your binder, Mr. Shomof. Now this is the e-mail you were referencing earlier, correct, with Dolores from Sears?
A Yes.
Q Okay. And if you go to the end of the e-mail chain -- just for reference, it begins in May of 2017. Correct?
A It's such a small print I cannot see it.

Q I'm sorry, Mr. Shomof. This is what was produced attached to your declaration. So I apologize for that. I can represent to you, Mr. Shomof, that the e-mail's dated May 11th, 2017. Are you okay with that representation?
A Yes.
Q Okay. So this e-mail that you've pointed to was after the April 1st, 2017, correct?
A Correct.
Q And in the e-mail on the first page -- right? Again, I apologize that the font is small. It's May 11th at 2:17. This is an e-mail from Dolores. Dolores acknowledges in the e-mail that you've missed the deadline of April 1st, 2017. Correct?
A Yes.
Q And then she goes on to say, "With that being said" -- or "that being the case, I'm asking that the HVAC and the seismic work be done at the same time. The expense of moving product and fixtures will be double if we need to do it twice. This is a great store for Sears and we do not want to affect the customers or associates more than needed." Correct?
A Yes. But I think you missed the paragraph when she said speak to legal and legal will -- and then she said after -- legal will approve it.
Q Well, let's look at her words, Mr. Shomof. It says "I

have spoken to legal" --
A If you don't mind, yeah. It sounds --
Q -- "and here are my remarks."
A -- like -- now what -- sorry.
Q "I've spoken to legal and here are my remarks." That's what Dolores wrote, correct?
A Yeah.
Q Okay. And so she acknowledged in the e-mail that you had missed the deadline. Correct?
A Yes.
Q And she said, in light of that, they want you to do the HVAC and the seismic together, correct?
A Yes.
Q Okay. And her assumption, if you look down in the next paragraph, was the seismic work -- the permits we pulled later that year, 2017, and the work will begin in January 2018. Correct?
A Yes.
Q Okay. And above your associate, Leo, writes as it relates to the seismic -- it's number 2 in the top e-mail: We "anticipate having permits around September of this year and the goal beginning early 2018." Is that right?
A Correct.
Q Okay. Now I want to turn to the latest invoice, Mr. Shomof, that you had provided, which is tab 17 in your

binder. Now this, Mr. Shomof, is Joint Exhibit number 10. It was attached as Exhibit 17 to your declaration. But it's also the invoice that was attached in January in support of your original cure objection. Do you see that?

A Yes.

Q And this is in the amount -- it's dated January 23rd, 2019. It's in the amount of just over 322,000, correct?

A Correct.

Q And this invoice has an assumption in it, doesn't it?

A What do you mean by --

Q If you look in the middle, there's an asterisk. And there's a note halfway down that says "Assuming Sears" --

THE COURT: I'm sorry. What exhibit is this?

MR. WEAVER: I'm sorry. We're in tab 17, Your Honor --

THE COURT: Of the witness binder?

MR. WEAVER: -- of the cross binder but it's also Joint Exhibit number 10.

THE COURT: Okay. Fine.

MR. WEAVER: Apologize, Your Honor.

THE COURT: Okay.

BY MR. WEAVER:

Q So there's an assumption in the middle of this invoice, correct?

A Yes. Correct.

Q And that assumption is that Sears did not pay for the equipment, correct?
A Yes. We will bill that amount -- we had the invoices sitting on the table and we were trying to clarify Sears paid for it or not. We have not gotten no answer. So we said assuming Sears did not pay that amount, 322,649 is owed.
Q You didn't know whether or not you'd been paid, correct, Mr. Shomof?
A We did not know if Sears paid it to the third party.
Q Ahh. So they could have paid it to the third party, Mr. Shomof. But you're seeking to recover it here, correct?
A Assuming -- if you look at what it says in the middle, assuming that Sears did not pay for it. Yes.
Q Mr. Shomof, you provided absolutely no backup for this invoice, correct?
A What -- the backup that we provided, that 75 percent -- the actual fact of the (indiscernible) that 75 percent of the work is completed. And we showed it in the pictures. And the pictures -- you asked for the judge to basically omit it.
Q Mr. Shomof, you provided absolutely no backup to this invoice, correct?
A No backup for the $205,000 if it was paid or not, we didn't know.

Q No backup for the 322,000 you're claiming through this invoice. Correct, Mr. Shomof?
A Backup to you or backup to Sears?
Q In this case. Backup in this case.
A I have to look into it. No, I'm not sure.
Q It's not attached to your declaration, correct, Mr. Shomof?
A If it's not then it's not --
Q It's not.
Now let's turn to the seismic retrofit, Mr. Shomof. And for this, we'll probably go back to tab 6, which is the 2015 amendment. And Mr. Shomof, under the 2015 amendment, you as the landlord agreed to be responsible for all the costs, correct?
A Responsible of all the -- which costs?
Q All the costs associated with the construction called for in the amendment. Correct?
A Yes.
Q Okay. And if you look at paragraph 8, which is page 17 of 135. We're still in tab 6. This is Joint Exhibit number 2.
A Yes.
Q Under "Seismic Work", you agreed that you were responsible for all necessary seismic repairs and improvements, correct?

A Yes.
Q And you also agreed that you would take best efforts to pull the permits 12 months after the city of Los Angeles approved, correct?
A Correct.
Q And then 12 months after that to complete the work. Correct?
A Correct.
Q You also agreed that the plans and specifications, schedules, authorized hours of construction activity and remediation plan for the seismic work would be pre-approved by the tenant pursuant to the demolition and construction protocol attached to the amendment. Correct?
A Correct.
Q And you also agreed that you would conduct this work in a manner that creates the minimum possible visual and noise inconvenience to the tenant and the customers. Correct?
A Correct.
Q Now, Mr. Shomof, you pulled the permits for the seismic retrofit in February of this year, correct?
A Correct.
Q Now your son, Jonathan, sent a letter to counsel for Sears, for the tenant, in September of 2018, correct?
A Correct.
Q And this is tab number 18 in your binder. It is Joint

Exhibit number 3. Let me know when you're there, Mr. Shomof.
A I'm here. I've seen it.
Q And in this letter, Jonathan says, "Hopefully, Sears will agree to close from February 1st, 2019 to August 15, 2019." Correct?
A Correct.
Q Now nowhere in this letter, that's tab 18, is there a detailed scope of work or detailed set of construction plans, correct?
A Yes. What scope of work there is attached. If you look at Exhibit 3 --
Q Well --
A -- it basically detail how we're going to -- how we're going to be -- start the job and setting up what is --
Q Is that the picture, Mr. Shomof? I'm sorry. This one doesn't have page numbers. I apologize.
A Picture of detail of how will it be. And with timeline. Again, on Exhibit 3, the page after that --
Q And we'll come back to the timeline in a second. But there's no construction plans here, correct, Mr. Shomof?
A Assuming Sears will want to proceed with continuing, plans will be submitted. The plan is the size of -- we have plans this size of my stand where I'm sitting.
Q So you were looking for a negotiation. Correct, Mr.

Shomof?
A I was not looking for negotiation. I was looking to agree on strategy how we're going to start construction.
Q So this related to strategy, not the actual construction plans. Correct, Mr. Shomof?
A Can you repeat it?
Q This related to a strategy issue not the actual construction specifics. Correct, Mr. Shomof?
A Actual construct -- we were planning to start construction in February.
Q But there's no plans in this letter, correct?
A Well --
Q Yes or no, Mr. Shomof?
A Well, there is not, no.
Q Okay.
A There is not.
Q Right. And there is a timeline you said, Mr. Shomof, in here. And this timeline assumes, does it not, that Sears would shut down for six months. Correct?
A Yes.
Q There's no other timeline in this letter, correct?
A In that letter, no.
Q Okay.
A But probably other ones, yes.
Q But this is the only letter you've attached to your

declaration, correct, Mr. --
A Yes.
Q -- Shomof?
A This is what we -- we have to seal.
Q Okay. And if you look at tab 19, Mr. Shomof, this is the e-mail that Jonathan sent to counsel for tenant that attached the letter at the top. And below there's a response from counsel for the tenant. Correct?
A Yes.
Q And in that response, counsel says, "To be clear, this letter does not appear to be offered in the spirit in which we discussed it last week. It comes across more as a direction from you as opposed to offering a proposed timeline and outlining some issues that remain to be negotiated before the process begins."
A Yes.
Q "The history of this project is riddled with errors that have put our employees and patrons at risk and reach negotiated protocols, not to mention broken promises about timing. Just two months ago, you notified us that you would likely not pursue this project."
This was the response you got from your letter, correct?
A Yes.
Q And if you turn the page, Mr. Shomof, at the end of

counsel's response to you, he states: "I have offered to meet with your lawyer so we can start to work through these issues. And I renew this offer." That's what he told you. Correct, Ms. Shomof?

A Yes.

Q And below that, your son forwards the letter to you and said, "Just want to confirm that you saw this e-mail. Let me know if you want to respond." Correct?

A Yes.

Q And there is no written response to that e-mail, correct, Mr. Shomof?

A It's probably written response from my attorney to him.

Q You didn't attach any written response to your declaration, correct, Mr. Shomof?

A So you're asking me if I attached a written response or you're asking me if there was a written response to --

Q Well --

A -- Steve?

Q -- Mr. Shomof, all I can do is talk about the evidence that you've tried to put before the Court. And I'm asking, is there any evidence in the record before this Court of a written response to this e-mail. Yes or no?

A If you don't have it here then it's not.

Q Mr. Shomof, the entitlements issued by the city of Los Angeles, they have not expired yet, correct?

A Not yet. We have another probably a lifetime --

THE COURT: I'm sorry?

A -- or another month.

THE COURT: How many --

THE WITNESS: Maybe another 30 days before it expiring.

BY MR. WEAVER:

Q You testified in your declaration that September 16th is the date you provided. Correct, Mr. Shomof?

A I testified to what?

Q September 16th is in your declaration, correct?

A Yes.

Q Okay.

A It's -- I think it's a little bit before September 16th.

Q So your declaration isn't correct, Mr. Shomof?

A I am not sure. I think it's before. It's -- my deadline was six months from February 16th. So whatever it comes.

Q Understood, Mr. Shomof. And on June 24th, Mr. Shomof, when I deposed you, you testified under oath that the project that we're discussing was not dead, correct?

A You asked me if the project is dead and I answered back to you I put my lifetime into this project. I want to believe not to. The reason is because I was negotiating

with someone to JB and that negotiation fell through.
Q Mr. Shomof, if you turn to tab 1 in your binder, that's a copy of your deposition transcript. You remember being deposed on June 24th, Mr. Shomof?
A I do, yes.
Q Your counsel was there, correct?
A Yes.
Q Court reporter was there, correct?
A Yes, I know.
Q You swore to tell the truth at that time?
A Absolutely.
Q If you would turn with me, Mr. Shomof, to page 146 of your deposition --
A What page again?
Q 146, Mr. Shomof. And starting on line 20, I'm going to read the question and answer. If you could read along with me, please.
"Q Mr. Shomof, is the development plan for Boyle Heights that we've been discussing today dead?
"A I hate to say, I literally hate to say even maybe. I'm trying. This is something that is my flux sheet on my projects. I've done 25 other projects. This is the biggest one. This is a -- I put my heart and soul into it. I want to get it to happen and developed. I've been through hell with the financing. I've been through hell with a lot of

getting permits. It was hard. The answer is I hope that it is in some way I can maybe salvage it.

"Q So the answer is no, it is not dead?

"A Yes. The answer is no, it is not dead."

Did I read that correctly, Mr. Shomof?

A Yes, you did.

Q Okay. And in your declaration of July 26th, Mr. Shomof, you testified the first time that during the deposition, you were in discussion with investors for a joint endeavor, correct?

A Correct.

Q And during the deposition when I asked you about whether or not the project was dead, you didn't say a word about those investors. Correct? Yes or no?

A The answer that you -- you've received here I chose the person with hope.

Q Understood.

A I hoped that the project would not die.

Q But you didn't say anything about other investors. Correct, Mr. Shomof?

A I was not asked if I have other investors. So I did not say that.

Q So you didn't say a single word about other investors when we were talking about whether the project was dead. Correct, Mr. Shomof?

A Did you ask me if there was other investors?
Q It's a yes or no question, Mr. Shomof.
A No. It doesn't say that -- it doesn't say at my deposition what I conduct.
THE COURT: I can read the deposition.
MR. WEAVER: Understood, Your Honor. I'll move on.
BY MR. WEAVER:
Q Mr. Shomof, to keep the entitlements valid, you need to begin construction, correct?
A Correct.
Q And to begin construction, you need to call in an inspector to show that you've started construction, correct?
A Correct.
MR. WEAVER: No further questions at this time, Your Honor.
THE COURT: Okay.
(Pause)
THE COURT: Any redirect?
MR. KUPETZ: Yes. Thank you, Your Honor.
THE WITNESS: Your Honor, if you don't mind, can you give me a bottle of water?
THE COURT: Sure.
THE WITNESS: Thank you.
THE COURT: That's fine.

THE WITNESS: Thank you very much.

REDIRECT EXAMINATION

BY MR. KUPETZ:

Q Mr. Shomof, I'd like to ask you some questions first with regard to the construction estimate deposit. Prior to the commencement of Sears' Chapter 11 case, what sort of communications were going on with representatives at Sears and the landlord with regard to construction estimate deposit?

A Rephrase your question.

Q Well --

A And if you can speak louder.

Q Okay. I'm sorry. I'm sorry. Let me rephrase it. It's too broad a question, I think.

After April 1 of 2017 and prior to the commencement of Sears' Chapter 11 case, with respect to the construction estimate deposit, did the landlord and representatives of Sears have ongoing regular communications?

A Yes.

Q And what was the substance of those communications?

A On the continuous work that is happening way after April 1.

Q And was Sears' representatives asking the landlord to do certain work covered by the construction estimate deposit after April 1, 2017?

A We were doing what was agreed on to do. It may not be completed on April -- before April 1 of 2017. So we were continuing -- continue to finish what left to be done.
Q And was --
A As of now, it's not 100 percent completed.
Q And after April 1st of 2017, was Sears asking you to do that work?
A Yes.
Q And were the communications between landlord and Sears to the effect that landlord would be reimbursed from the construction estimate deposit for that work?
MR. WEAVER: Objection, Your Honor. It's leading, that question, Your Honor.
THE COURT: You should rephrase it.
BY MR. KUPETZ:
Q That work that was being done after April 1, 2017, with respect to the categories covered by the construction -- by the construction estimate deposit --
THE COURT: Who was to pay for it? Or how was it to be paid for?
THE WITNESS: As agreed on the agreement, as construction proceeding and completing, they would pay us. And they continued paying us after April 1 of 2017. They paid us a year later in 2018, April of 2018. They continued paying us.

BY MR. KUPETZ:
Q And that payment came from the construction estimate deposit as you understand it?
A The payment was coming from the payment -- from the deposits, yes.
Q And that was for work done after April 1, 2017.
A Correct.
Q Now in doing work after April 1, 2017, was Landlord relying on representations of Sears about getting paid?
MR. WEAVER: Again, Your Honor. He's testifying here.
THE COURT: You have to stop leading.
MR. KUPETZ: I'll rephrase it.
BY MR. KUPETZ:
Q Why did you -- why did Landlord do work after April 1, 2017?
A Because we owed it as agreed. Job needs to be completed. So we continued doing it after April 1 and -- of 2017 and we were getting paid, just like I said before.
Q Now is it your understanding -- did Sears make any requests to Landlord with regard to the timing of the work?
A Repeat it again.
Q With respect, for example, to the HVAC work, was there a request made by Sears?
A Yes. They preferred to do it together with the seismic

retrofit. That's her recommendation. Dolores -- we wanted to do it before and get paid, the HVAC. She said we rather -- after she's basically specifying "I spoke to legal and we prefer doing it together with the seismic."

Q Now what is the status of the completion of the work covered by the construction estimate deposit?

A All the HVAC units which I have pictures -- and I would love to share it with the judge -- Your Honor here, all the HVAC, the compressor on the outside of Sears space, it's already been installed and connected. All the IT room, all the electronics of their computers and everything has been relocated into the Sears space. HVA -- a big portion of the HVAC was done in the IT room. All the façade was completed. All the signage were completed and installed. The majority of the work was done. What got left to do is put the HVAC condensers inside Sears' space. And the condensers, it's already been paid for, installed on Sears' property in a containers which I attached pictures to show that the condensers are there. We were ready to do it. But they asked us to do it at the later time. When I say they, I mean Sears. Dolores from Sears.

Q Now after the commencement of Sears' Chapter 11 case, did Landlord receive any substantive communications or response from Sears with regard to any type of construction at the property?

A After what date?
Q The commencement of the Chapter 11 case which was mid-October of last year.
A When Sears went into bankruptcy and that was shocking for us, no communication whatsoever with Sears. Everything just died.
Q Now is it correct -- I know counsel for Transform asked you about communications with Mr. Velkei. Is it correct that with respect to the renovation of the project that Landlord was in communications with Sears' counsel, Mr. Velkei?
A I was continuously meeting with Steve Velkei and Alan Shaw from Sears. Steve Velkei is Sears' attorney. Alan Shaw is Sears' representative in regards to construction. We met few times and we were talking about how we were going to be proceeding with the construction of Sears.
Q And what did Mr. Velkei tell you in terms of further communications once Sears commenced its Chapter 11 case?
A Again, Steve is the only contact that I had. I tried getting a hold of Alan Shaw. Alan Shaw was either fired or quit or laid off. So there was no -- nowhere to be found. Alan Shaw was nowhere to be found, no reply whatsoever from Sears. I kept on going back to Steve. And up until I would say a month through later when Steve says let me Izek, I'm in limbo myself. I don't know where he's going. At one

time, Steve was get -- got laid off and rehired again. So Steve says, Izek, the best thing for you I recommend you get yourself a bankruptcy attorney to help you here.

Q And is that what you did?

A And that's what exactly I did.

Q And then did you continue on behalf of the landlord to try to reach out to Sears?

A Repeatedly.

Q And did you get any substantive response from Sears?

A Nothing. Even Steve himself, attorney for Sears, could -- couldn't get a hold of no one.

Q With respect to the current status of the project and whether or not it's dead and the questioning that you were receiving, what is your view of the current status of the project?

A Can you repeat it again, please? You were asking me a question?

Q Yes. What is the current status of the project, the renovation and rehabilitation of the property, the big project, not --

A For the overall project?

Q Yes.

A What is the status of it? It just died out. I mean, the lender pulled away. Once the lender pulled away, I have no funds to basically start construction. So died out.

Q And why did that occur?
A Because there was a condition -- one -- there was a condition with the lender that they want to see an agreement with Sears that they will allow us to go in and do the seismic retrofit. They were afraid -- they knew that Sears' bankruptcy, it's an issue. They were afraid to finalize the loan and start funding. And then I have no access to Sears which I told them Sears are occupying 70 percent of the ground floor. I have another 30 percent of the ground floor that I can start construction in the 70 per -- in the 30 percent. And they said what happened if Sears would go in bankrupt for another year and they're not going to give you access to their space. So that's why I was reaching out to Sears repeatedly to try to some kind of an agreement from them to give my lender to assure the loan or to fund the loan but to know if they're back in April of 2019 -- March or April. They just send us a letter and say we are pulling off, pulling away.

MR. KUPETZ: Thank you.

THE COURT: Any recross?

MR. WEAVER: I'll be brief, Your Honor.

RECROSS-EXAMINATION

BY MR. WEAVER:
Q Mr. Shomof, the evidence that you've submitted in this case in support of the work that you've done is contained in

the three exhibits that we've been talking about, the invoices, correct? That's the evidence you submitted.

A I submitted more than that. I don't know what you're showing. I submitted bunch of invoices here that were paid after -- all the way up to April of 2018. And it seems like you're not talking about it.

Q Well, Mr. Shomof --

A And I'm wondering why.

Q Mr. Shomof, you testified before that some of the invoices are from 2014, correct? That you incurred. 2014, correct?

A I testified because you mention. I said could be, yes.

Q And the first invoice from you to Sears is in 2017, correct?

A Wait a minute. I am little confused. The agreement occurred with Sears on 2015.

Q Correct.

A And you're saying --

Q The first invoice --

A The amended -- hold on.

Q -- that you sent --

A Hold on.

Q -- in to Sears --

A I'm a little confused here. If you don't mind, let me ask you a question. What you're saying here is work was

done prior to the amendment of the agreement with Sears?
Q By looking at the calendar, that would seem to be the case. But that's not my question, Mr. Shomof. My question is, you've submitted evidence that says there was -- part of the backup is from 2014/2015. The first invoice that you sent to Sears is dated August 16th, 2017. Correct?
A The first invoice?
Q That you sent to Sears.
A Was when?
Q August 2017. Correct?
A Hold on. I have it here. Before I answer, let me just see it and make sure.
Yes. I have August 16 --
Q 2017. Correct, Mr. Shomof?
A Correct.
Q Okay. Now, Mr. Shomof, you also testified about having possession of 30 percent of the ground floor of the building, correct?
A Correct.
Q You could go tomorrow and begin construction on that 30 percent. Correct, Mr. Shomof?
A I cannot go tomorrow and start construction because I have no financing.
Q But for financing, Mr. Shomof, you could tomorrow -- on Saturday, perhaps not -- on Monday to the 30 percent and

begin construction. Correct, Mr. Shomof?

A Except for funding, yes.

MR. WEAVER: No further questions, Your Honor.

THE COURT: Okay. Any redirect on that?

MR. KUPETZ: No, Your Honor.

THE COURT: Okay. You can step down, sir.

THE WITNESS: Step down?

THE COURT: Yeah.

(Witness excused)

MR. WEAVER: Your Honor, are you prepared to hear argument at this time?

THE COURT: Well, let me just make sure. Is there any other evidence other than what's in the record and the testimony that I've just heard?

MR. WEAVER: Nothing from Transform, Your Honor.

THE COURT: Okay.

MR. KUPETZ: Just the declarations.

THE COURT: Right. Those are already in evidence. Okay.

Just going back to the evidentiary rulings at the start of the hearing, I will admit the invoices in Landlord 2 through 4 in that evidence binder.

(Landlord's Exhibits 2 through 4 received in evidence)

THE COURT: Okay. So then I will hear brief oral argument.

MR. WEAVER: I will try to be brief, Your Honor. Again, Andrew Weaver, Cleary Gottlieb, on behalf of Transform.

Your Honor, as you know, on May 13, 2019, the debtors assumed and assigned the vast majority of its leases to Transform. Since then, Transform has worked to resolve any outstanding landlord objections and continues to make good progress on that front. Unfortunately, we were not able to reach consensual resolution as to this property, Your Honor, which is why we're here today.

The store at issue, Your Honor, occupied the portion of the building on East Olympic Boulevard in Los Angeles and was subject to a sale lease back in 2004. The building and the property are also the subject of certain tax entitlements in favor of the landlord that are tied to the redevelopment project. Now this store is a key part of Transform's go forward plan, Your Honor. And it's actually one of the best performing stores in the Sears portfolio.

There are two disputes at issue here before Your Honor. And both of them are improper attempts by the landlord to benefit from the Sears bankruptcy and present no actual contract of fault that would be the basis of a proper cure objection.

The first, Your Honor, the landlord seeks the return of a construction estimate deposit when there is no

dispute to the fact that the landlord failed to meet an unambiguous deadline. And more importantly, Your Honor, the work covered by that deposit is not yet complete. So there's nothing, in fact, for us to be deciding until that work is done.

The second, Your Honor, the landlord invokes the covenant of good faith and fair dealing in order to try and collect speculative consequential damages due to the fact the landlord has not moved forward with the project and is at risk of losing those tax entitlements.

Just briefly in background, Your Honor, the operative lease here is Joint Exhibit 1. It's from 2011. This is before the landlord had bought the building. And it's very clear in paragraph 2 that the parties acknowledge, most critical, the successful operation of the business at the premise that the tenant have access, use and enjoyment of the building.

Now following the landlord's purchase of the building, Your Honor, the parties entered into a 2015 amendment whereby the 2011 lease still controls the parties' responsibilities and obligations except to the extent the 2015 amendment conflicts and the amendment would then, Your Honor, control.

Now, Your Honor, we're here on a cure dispute. And Your Honor, of course, is well familiar with U.S.C.

365(b) which basically provides that if there's a default under an unexpired lease, the trustee, or here that are in possession are here Transform, must cure that default and compensate for any actual pecuniary loss to such party resulting from such default. Now, Your Honor, there's no dispute as to the effectiveness of the leases. The leases are in effect and have not expired.

There are two categories, Your Honor, of what we call proper cure objections. The first is for CAM charges. In the original cure objection filed in January, the landlord sought over $5,000 in CAM charges. Those charges weren't actually due until February. In February, the tenant did, in fact, pay those CAM charges with check number 183116. For some reason, the landlord did not cash that check, Your Honor.

Arguably, they're fair to cash a check with way unique basis for claim there but Transform is prepared, Your Honor, to resubmit a check for that CAM amount if they assume and assign the lease.

THE COURT: Okay.

MR. WEAVER: The second, Your Honor, is for property taxes, again, just south of $44,000. There's no dispute as to that amount and it's typical of all of our orders, within five business days of entry of the order, Transform will provide those funds to the landlord.

THE COURT: Okay.

MR. WEAVER: So those are proper cure objections, Your Honor. But what is happening -- what we're arguing about today, Your Honor, is quite a big stretch from that.

First, let's talk about the construction estimate deposit. And here, Your Honor, of course, we have to start with the agreement. And this is, again, Joint Exhibit number 2. And this, Your Honor, provides clearly for a list of construction projects that the landlord has to perform. And, Your Honor, if we look to paragraph 25 -- I won't belabor the point. You just heard it read during cross. But here is where the deposit is put in to 3.25 million. There's a list that must be completed by April 1st. And to the extent that the landlord timely completes the work and it's acceptable, they will get any that's left over. But it is clear that if they don't meet the deadline, the funds "shall be released to the Tenant, at Tenant's election". So the tenant can cause the work to be completed and seek more money for the landlord if necessary.

But, Your Honor, that's not the only relevant portion of the contract.

THE COURT: Well, can we just walk through this?

MR. WEAVER: Sure. Happily, Your Honor.

THE COURT: First of all, the introductory paragraph in paragraph 25 sets up the three and a quarter

million construction estimate deposit "to partially secure Landlord's design, repair, construction and completion obligations under this agreement". We've already established that those obligations are introduced by paragraph 2 and they go through paragraph 10.

MR. WEAVER: Correct, Your Honor.

THE COURT: And it includes seismic work.

MR. WEAVER: It does.

THE COURT: But only -- but we'll go back to that in a second.

The paragraph then says that "Tenant shall in turn within a reasonable time thereafter, but in any event within thirty (30) days of Landlord's written request, deposit the Construction Estimate Deposit with either First American Title Insurance Company or another title insurance company acceptable to Tenant ('The Construction Fund Escrow') to enable Landlord to be able to draw upon those funds in the Construction Fund Escrow to pay for Landlord's design, repair, construction and completion work as required per this [Agreement] on terms acceptable to the Tenant upon joint written instruction given to the escrowee".

The escrow wasn't done, right?

MR. WEAVER: Correct, Your Honor. The parties agreed not to put it in the escrow.

THE COURT: But that agreement didn't vary

anything else about the payment of the construction -- of the landlord's design, repair, construction and completion work for this agreement?

MR. WEAVER: Correct.

THE COURT: You're clear on that, right? There's no agreement changing that paragraph in writing.

MR. KUPETZ: Right. Just as there was no agreement with respect to the deposit not being held by a third party.

THE COURT: Well, I mean, it says within a reasonable time. I gather the parties decided there was no reasonable time. And there was no request by the landlord to put it in.

MR. KUPETZ: Correct.

THE COURT: Okay. So then paragraph (d) says: "In the event Landlord does not complete the work contemplated in Sections 3, 4, 6 and 7 by April 1, 2017". Now, 3, 4, 6 and 7 deal with HVAC -- I'm actually going out of order here. Low voltage service, HVAC, plumbing --

MR. WEAVER: Signage and façade, Your Honor.

THE COURT: Right.

MR. WEAVER: Not plumbing, technically.

THE COURT: Not plumbing.

MR. WEAVER: Technically, not plumbing.

THE COURT: Façade and signage. Okay. "[B]y

April 1, 2007 (sic), the remainder of funds in the Construction Fund Escrow shall be released to Tenant, at Tenant's election, so that Tenant can cause the work to be completed and Tenant shall be entitled to payment by Landlord [of] any additional amounts necessary to complete the work" which is consistent with paragraph 2 which says the landlord shall bill all the costs.

So I believe it's undisputed, but I just want to confirm this, that the work covered by Sections 3, 4, 6 and 7, none of that work was completed by April 1?

MR. WEAVER: I don't think it's none of the work, Your Honor, but it was not completed.

THE COURT: Some of it. Some of it was completed.

MR. WEAVER: Some of it was. And --

THE COURT: No. But it's a different -- I didn't ask that question correctly.

MR. WEAVER: No one objected, Your Honor.

THE COURT: Each one of those sections contemplated a project. Is it understood that none of those four projects was completed by April 1? It was worked on, I understand that. But none of them was completed by April 1?

MR. KUPETZ: That's correct.

THE COURT: Okay. So the contract provides then that if that work, the project, isn't done by April 1, 2007 (sic), "the remainder of funds shall be released to Tenant,

at Tenant's election". Now here, the tenant was still holding it, right?

MR. WEAVER: Correct, Your Honor.

THE COURT: But it's also agreed that Tenant didn't make any election so that it could cause the work to be completed, right?

MR. WEAVER: Well, Your Honor, I don't think there is anything -- there's really nothing in the record about a formal election.

THE COURT: Right.

MR. WEAVER: And I think part of this, Your Honor, is that this dispute isn't ripe for a cure objection. If there was a dispute in the future, I believe Sears would be able to put forward evidence that --

THE COURT: Well, I'm just walking through this.

MR. WEAVER: No.

THE COURT: I'm just trying --

MR. WEAVER: Understood.

THE COURT: -- to get the facts down.

MR. WEAVER: Fair. My essential --

THE COURT: I understand the argument. I just --

MR. WEAVER: Well, it's not the argument. It's a fact -- I don't want to testify, Your Honor, but I understand Sears did spend money, Your Honor. I just --

THE COURT: Well, that's my question is, "at

Tenant's election, so that Tenant could cause the work to be completed". So, you know, that clause seems to contemplate the reasonable agreement between the parties that if the landlord couldn't do it, at tenant's election, that tenant would do it -- have someone do it for the tenant. I mean, Sears doesn't do its own work, I'm assuming --

MR. WEAVER: Correct, Your Honor.

THE COURT: -- for all of these things.

Now there is a little bit in evidence just based on what I heard from the testimony that there was perhaps some assumption that Sears might be paying for something already. That was the invoice that had the asterisk on it for the 250 something thousand.

MR. WEAVER: Correct, Your Honor.

THE COURT: Is there any other evidence in the record that Sears was doing some of this work or subcontract -- contracting it out to someone else?

MR. WEAVER: Your Honor, there's not. There was not evidence put in. Again, well, to answer your question, no, Your Honor. I can explain if you'd like. The answer is no, Your Honor.

THE COURT: Okay.

MR. KUPETZ: Your Honor, as far as the landlord knows, Sears hasn't paid for anything --

THE COURT: Well, all right. But that's neither

here nor there.

MR. KUPETZ: There's no evidence in the record that Sears paid for anything.

THE COURT: Except the disastrous bill. But that's -- there's no evidence that that actually was the case, right?

MR. WEAVER: Well, I'd note, Your Honor, there's no evidence of anything about that bill. But --

THE COURT: No. That's fine. I agree with that.

MR. WEAVER: But nothing about the actual -- correct, Your Honor.

THE COURT: Okay. So, in any event, it seems that the agreement did provide that, you know, if the landlord didn't meet its deadline then Sears could basically take over the work how ever it wanted to --

MR. WEAVER: Correct.

THE COURT: -- subject to the landlord being liable for it.

Then the next sentence says: "Upon Landlord's completion of the work described in Sections 3, 4, 5, 6 and 7 in a timely manner, and its inspection and acceptance by Tenant, any remaining Construction Estimate Deposit funds shall be dispersed to Landlord subject to review and approval of the parties regarding the amount in question."

So we have some testimony from the witness that

most of the work was completed. And he also says that the HVAC condensers -- well, it had been ready to be installed but that "Sears asked to put that off". Do we have -- is there anything in the record that says that work hasn't been completed? I mean, there's testimony that says 75 -- I mean, the declaration says 75 --

MR. WEAVER: Declaration itself, Your Honor, says the work isn't done.

THE COURT: Right. That's correct, right? The declaration says 50 percent, 75 percent --

MR. KUPETZ: Well --

THE COURT: -- parts of it --

MR. KUPETZ: -- it says the work --

THE COURT: It goes through -- let me turn to it.

MR. KUPETZ: Yeah. We should probably look --

MR. WEAVER: Paragraph --

MR. KUPETZ: -- at the declaration.

MR. WEAVER: -- 33 --

THE COURT: Right.

MR. WEAVER: -- I think, or so, Your Honor.

THE COURT: Right. So I'm looking at Mr. Shomof's declaration in support of the reply.

MR. WEAVER: 34, Your Honor.

THE COURT: Paragraph 34? "The HVAC work is approximately 75% complete. The remaining approximate 25%

of the job includes labor to install condensers". He doesn't really refer -- well, I'm sorry. Let me go back.

And then 35 says, "Other than the HVAC work, the only remaining work to be done" is plumbing. But that's not -- that's a different time frame.

MR. WEAVER: Correct, Your Honor. Well, it's the same time frame. It's just not covered by the subsection --

THE COURT: Right.

MR. WEAVER: -- (d).

THE COURT: Right. Exactly. So -- and obviously, that work was not done -- based on the declaration and the invoices, that work was not done by April 1, 2017.

MR. WEAVER: It's not disputed, Your Honor.

THE COURT: So, I guess, to me, and I'd like the parties to address this, the dispute as to any right to get the remainder of the tenant escrow depends on the meaning of the word "timely" in that second sentence. Right? Because that -- it doesn't say in the second sentence, "Upon Landlord's completion of the work described in Sections 3, 4, 5 and 6 by April 1". It says in a "timely manner" --

MR. WEAVER: Correct, Your Honor.

THE COURT: -- "and its inspection and acceptance by Tenant". Now you're saying that "timely" must refer back to April 1.

MR. WEAVER: I don't know how it wouldn't, Your

Honor. In addition to the acceptance by the landlord -- by the tenant. I'm sorry, Your Honor.

THE COURT: Right.

MR. KUPETZ: And, Your Honor, of course, the landlord would say when we're in ongoing discussions with Sears and among other -- prior to the bankruptcy and among other things, they ask us to delay some of the work and they're aware that we're doing the work and saying we're going to get reimbursed, that "timely" was certainly after April 1 is understood to still be outstanding 'cause they'd finish the work if they had access to the premises right now. But Sears was nonresponsive.

MR. WEAVER: Your Honor, if I --

THE COURT: Well, so I think that frames the issue. So that's what I'd like you to address. Those arguments which you probably weren't going to address but I wanted to go through the --

MR. WEAVER: I'm going to cut right to the chase.

THE COURT: -- facts first --

MR. WEAVER: Fair enough. No problem, Your Honor.

THE COURT: -- to get to that area of disagreement --

MR. WEAVER: Right.

THE COURT: -- on the return of the money in the account.

MR. WEAVER: Right. Well, Your Honor, if I may, I think -- first of all, the only evidence we have to talk about, really, the true evidence, is this one e-mail. I want to talk about that e-mail, about what the request was. I think it all relates, Your Honor, because when we go through that e-mail, there was a discussion about doing -- the deadline had passed. April 1st had passed and they had not met their deadline. But the tenant made a decision under the assumption that the seismic work was about to get started that they should do it together. And the tenant can keep that decision and optionality, Your Honor. And it's provided for specifically in the agreement. This is something I think we have to look at. We can't look at this provision in isolation. We have to also look on the page previous on paragraph 23 of the amendment, Your Honor. And that is the extension of time express waiver provision.

And that provides: "The parties hereto may, only by an instrument in writing, extend the time for or waive the performance of any obligation of the parties hereto."

And I think the important language is: "Failure on the part of either of the parties to enforce any rights which they may have against the other for the other's breach of this [Agreement] shall not constitute a waiver of the said right, nor shall any written waiver given by a party pursuant [t]hereto be deemed to constitute a waiver of any

other right not expressly waived therein."

Your Honor, that language has to be read with this provision.

Now, as a practical matter, Your Honor, as a tenant and a landlord, do they have to work these things out? Does the tenant want this work to happen? Absolutely, Your Honor. But we're here about a cure objection, about a default under the agreement. And when you take that language with the provision, I think it, frankly, takes away a lot of the factual discussion that we have to have. It's not in dispute that the work wasn't done. It is in -- they've raised a course of conduct, Your Honor. But the California case law they cite is clear, course of conduct cannot contradict the express terms and they can't get around paragraph 23, Your Honor. They just can't.

THE COURT: Well, let me lay something out to you.

MR. WEAVER: Sure, Your Honor.

THE COURT: I understand that there's a deadline in the first sentence. And it talks about the funds being released to the tenant at tenant's election. There's no formal election. But the tenant had the funds already.

MR. WEAVER: They wouldn't have to elect because it wasn't with escrow, Your Honor.

THE COURT: Right. So the tenant then, it appears to me, did, in fact, cause the work to be completed. It

used --

MR. WEAVER: It -- I was coming to that point, Your Honor.

THE COURT: It used the landlord's subcontractors to do that through the landlord and perhaps argue -- although the record is -- really doesn't support this -- perhaps it spent of its own money, too.

I believe what you're saying is that that's fine. That's why it did what it did. And then -- but that doesn't change the operation of the second sentence which says that you got to complete it in a timely manner as a condition to getting the money back.

MR. WEAVER: If you rely upon that provision, yes, Your Honor.

THE COURT: Right.

MR. WEAVER: As you --

THE COURT: Well, that's the provision that says the money comes back.

MR. WEAVER: Correct, Your Honor. But as you just outlined --

THE COURT: 'Cause there was no formal election.

MR. WEAVER: Correct. But as you just outlined, Your Honor, they had the option to use the landlord work. They had that option. And that wouldn't be -- they wouldn't be entitled to return the funds if they elected to go that

route. The reason you have paragraph 23, Your Honor, is so the tenant can make its decision that things are most economical. And it would be one thing, Your Honor, if they had any backup for this one-page invoice that they've submitted. Then maybe we could even talk about it. But we have nothing. Your Honor, we literally have nothing other than one page. And --

THE COURT: Well, can we go to that?

MR. WEAVER: We can. And their deadline, Your Honor, was May 1st.

THE COURT: I guess this is -- I'm a little confused about this. Is the -- this is as much a question for you as counsel for Transform.

Is the claim by the landlord for, you know, in excess of a million dollars based on this deposit? Is it premised on work it did or that it paid for that hasn't yet been paid? That's one.

Or is it simply for the return of the remaining amount of the deposit because it didn't actually have to pay for the work beyond what it's already been paid for and therefore, it's entitled to a refund?

Which one of those two is it?

MR. KUPETZ: It's both.

THE COURT: It's both.

MR. KUPETZ: There's 322 --

THE COURT: You can stand up. I know in California they do it differently but in New York --

MR. KUPETZ: I'm sorry.

THE COURT: -- they stand up.

MR. KUPETZ: I'm sorry, Your Honor. Should I go to the --

THE COURT: No, no. The microphone will pick you up. It's just that they (indiscernible). Okay.

MR. KUPETZ: The 322,000 is for work that's been done and hasn't been paid for.

THE COURT: Okay.

MR. KUPETZ: There would then be additional work that the landlord is prepared to do to finish completely that the landlord estimates at 375,000. Completely. And that would leave approximately 727,000. The landlord's view, as set forth in the declaration, is that the deposit was always set up with an intended buffer --

THE COURT: Right.

MR. KUPETZ: -- in there.

THE COURT: Okay. So do you agree with that that there's an amount that it's claimed 322,000 that's been done and not paid -- for work that's been done and not paid for and the rest is just for the return of the overcollaterization?

MR. WEAVER: I agree, Your Honor, that their --

THE COURT: That's their claim.

MR. WEAVER: -- their objection was --

THE COURT: All right.

MR. WEAVER: -- 322 for work done, return of the rest.

THE COURT: So as far as the 322 --

MR. WEAVER: Yes.

THE COURT: -- I believe you're contending that the bill just doesn't support -- there's no backup for that bill except for a relatively small amount?

MR. WEAVER: Well, I have -- well, I have two arguments. As a fundamental evidentiary matter, yes, Your Honor. When they submitted their cure objection on May 1st, they submitted a one-page invoice with nothing else.

THE COURT: Right.

MR. WEAVER: Today we're now a few months later. There's still nothing else for that invoice. Nothing. So that's what we have.

But it's a technical reading in the agreement, Your Honor, but I think it's the correct reading, which is to the extent the tenant decided to use -- to do this, how did the landlord do this work. It's no longer operating under the provision of Section (d). If they want to claim they've done work and they haven't been paid for it, Your Honor, it's not a breach of this provision, it's not a

breach of this agreement. It's -- the tenant has elected to complete the work itself. And it may be using them. But it's not a breach of --

THE COURT: But it would have to pay for it.

MR. WEAVER: Correct, Your Honor. And they could bring a breach action. But it's not a cure --

THE COURT: All right.

MR. WEAVER: -- under this lease, Your Honor. That's what we're arguing.

THE COURT: Okay.

MR. WEAVER: This is not a proper --

THE COURT: All right.

MR. WEAVER: -- cure objection.

THE COURT: I understand that point.

MR. WEAVER: Okay.

THE COURT: All right.

MR. WEAVER: If there's nothing else on that, Your Honor, I'll move on.

Again, though, emphasize -- well, I don't want to move on, Your Honor. I'm sorry. I feel like I do have to address it.

You know, the course of conduct that they want to rely upon here, Your Honor, again, we really -- in the record, we have one --

THE COURT: Can --I'm sorry to interrupt you.

MR. WEAVER: No. Of course.

THE COURT: But it actually -- and I don't want to get you in trouble with your client but I think this -- and I actually think what you said was the correct legal response. But --

MR. WEAVER: Thank you, Your Honor.

THE COURT: -- I just want to point out to the landlord that if the 322,000 were a cure objection, it wouldn't be sustained on this record. What counsel just said is, it's not a cure objection. It's a right either under quantum meruit or based on the parties' actual dealings with each other as to the work that was done post-April 1. So it preserves the right to get paid for that which if it were a cure objection, you probably have -- well, you haven't sustained unless you can show me the backup. But go ahead.

MR. WEAVER: Well, in that case, Your Honor, I'm going to not deal with course of conduct unless --

THE COURT: Right.

MR. WEAVER: -- you want to hear more about it later, Your Honor. I -- for efficiency purposes, I'm happy to move on to the seismic --

THE COURT: Well, I mean -- why don't you cover it?

MR. WEAVER: Okay.

THE COURT: I mean, the parties have addressed it in their papers. So --

MR. WEAVER: They have, Your Honor. I just think that it's really important that the language of paragraph 23 -- because course of conduct -- first of all, I don't think we have course of conduct here. But even if there was a course of conduct, you cannot go contrary to an express provision. You can't. California law is clear on that. The cases they cite are clear on that, Your Honor. You can't go against an express provision. 23 is express.

THE COURT: Which is the no-waiver provision.

MR. WEAVER: No-waiver provision. The fact that we don't enforce our right on April 2nd doesn't mean we've waived it. That's -- I should say the tenant's right, Your Honor.

THE COURT: It could go to explain the word "timely".

MR. WEAVER: It could, Your Honor.

THE COURT: But --

MR. WEAVER: It could, Your Honor. And if we want to limit it to that, Your Honor, I'm very happy to look at the e-mail from May 11th.

THE COURT: Right.

MR. WEAVER: This is Landlord Exhibit 5. And this is the e-mail from Dolores -- and no one can pronounce her

last name, Your Honor so we keep calling her Dolores. So I apologize for that.

THE COURT: Okay.

MR. WEAVER: And in the discussion -- and again, this is after the deadline has passed. She acknowledges the deadline has passed and says, in light of that, what we'd like you to do, we're making the decision, we want you to do this with the seismic work because that's more efficient for us. And there's an assumption belongs to that. The assumption is the seismic work's about to get started. We're going to pull the permits that year; we're going to start in January 2018.

The record's clear, Your Honor. They didn't pull the permits of this year. So the idea of "timely", Your Honor, the course of conduct there is irrelevant. There was a discussion about doing the work together. But that -- even deciding to make that offer doesn't waive their rights under the provision.

THE COURT: And, in fact, it really wasn't done together, right?

MR. WEAVER: It hasn't been done. The seismic work hasn't been done at all.

THE COURT: No, no. The HVAC work was done separately. It wasn't timed to the seismic work.

MR. WEAVER: Apparently. Correct. Correct, Your

Honor. Correct, Your Honor.

And then the other e-mails, Your Honor, just to touch on them briefly, they're frankly all about having meetings in Los Angeles amongst landlord and tenant. If you look at Landlord's Exhibit 6, there's this discussion we've talked about. There's talk about landscaping and building security, pulling aside the permits. Exhibit 7, Your Honor, frankly, is the same communication that was in Exhibit 12 so they've repeated themselves.

Exhibit 14 has to do more about meetings. Exhibit -- I'm sorry -- Exhibit 8. Exhibit 9, more about meetings.

THE COURT: I'm sorry. When you're referring to these exhibits, these are the exhibits in the witness binder?

MR. WEAVER: No, no. The landlord exhibits. I'm sorry, Your Honor. The landlord exhibits. I can --

THE COURT: Fine.

MR. WEAVER: We didn't catch them all.

But the point is, Your Honor, the discussion in the e-mails that's relevant here is this discussion about doing the seismic work together. That's the only discussion that's relevant. And I would argue, Your Honor, that the only course of conduct that's been demonstrated today is that the landlord took forever to bill the tenant. They submit -- they want to argue because the tenant paid them

after the deadline that that somehow indicates their acquiescence. But they didn't even bill them until after the deadline, Your Honor. And we looked at the invoices today. Almost all of the invoices are before the deadline. But the ultimate invoices to Sears came after the deadline. So that's the course of conduct. They bill late and they were paid.

THE COURT: Well, bill late for services when?

MR. WEAVER: Before April 1st except for the 14 invoices that we've identified. And many of them are from the month of April 2017, Your Honor. That's what the record provides.

(Pause)

THE COURT: Okay.

MR. WEAVER: Then, Your Honor, turning then to the seismic retrofit issue, Your Honor, here we look to first Joint Exhibit number 1, which is the 2011 lease. So at paragraph 2(a)(3), Your Honor, it says that, "Without tenant's prior approval, which may be withheld for any or no reason in its sole discretion, Landlord shall not construct or install any improvements or make any changes to Tenant's Control Area or interfere with or obstruct Tenant's use thereof in any manner whatsoever."

Now the point of that section, Your Honor, isn't to argue that Sears can simply put their head in the sand

and say you can't do any work. But that's the starting point. That is where we start from. And from there, we then move to the 2015 amendment, Your Honor.

So if we go to Joint Exhibit 2, which is the 2015 amendment, Your Honor, you already identified yourself that paragraph 2 lays out at the beginning that the landlord shall be responsible for the costs and expense related to these projects. And if we go to paragraph 8, Your Honor, which is the seismic work paragraph, again, it makes clear the landlord's responsible for all of the seismic repairs. They're to pull the permits within 12 months of when LA approves. They're then also to complete the work within 12 months after pulling the permits.

It also provides in that section, Your Honor, that "The plans and specifications, schedule, authorized hour of construction activity and remediation plan for said seismic work shall be pre-approved by Tenant pursuant to Demolition and Construction Protocol attached hereto as Exhibit C, and conducted in a manner that creates the minimal possible visual and noise inconvenience to Tenant and its customers."

So that's the work, Your Honor, that needs to be done and how it needs to be done.

So to look at Exhibit C, Your Honor, to this agreement which is --

THE COURT: The construction protocol.

MR. WEAVER: Yeah. And that is found -- if you look at the ECF pages at the top, I think it's page 48 of 135.

THE COURT: Right.

MR. WEAVER: And here, Your Honor, we're dealing with paragraph 2(b) which is the non-hazardous materials.

THE COURT: Right.

MR. WEAVER: So it says, "Landlord shall provide two weeks notice." And it states that such notice "shall include the scope of work contemplated, a detailed set of plans and specifications for the same together with a schedule, authorized hours of construction activity and remediation plan for the same". And this provides that if the tenant doesn't respond in 10 days, that's considered to be approval of those plans.

So, Your Honor, the landlord simply did not meet their obligation under the agreement. So there's nothing to be arguing that there was any breach under the 2015 amendment, Your Honor. The thing they point to is Joint Exhibit number 3 which is September 25th letter. And, Your Honor, that letter does not have any detailed plans, no floor plans, no specifications. The testimony's been that it was a negotiating document, Your Honor. The idea was there'd be a back-and-forth. The only timeline included in that was that Sears would shut down for six months. And,

Your Honor, I could point to all the provisions in the two contracts that make very clear that it was important that the store continue to operate. And the idea that Sears would shut down particularly on the eve of bankruptcy for six months, there's no offer of compensation for that, Your Honor, frankly, is absurd. It may have been a condition of the construction financing they were looking for but that's not on the tenant, Your Honor. The landlord assumed all the risks for the costs for this project.

And importantly, Your Honor, the person to whom that letter was addressed responded. And this is Joint Exhibit 11, Your Honor. And I don't need to read the entire paragraph to you again, Your Honor, but it's clear in that response not only that this was not what the parties had been talking about but that there were concerns on the side of the tenant about missing deadlines and that they stated just two months prior that they may not go forward with the project, Your Honor. That was the response.

And the response further was an offer from counsel to meet with the lawyer. Now we heard a lot on the stand today about verbal conversations, Your Honor. But to the extent anyone thinks something in writing is inconsistent with the facts, usually they respond in writing to keep the record clear. And there's no written response to counsel's communication, Your Honor. There's none. And I think that

speaks volumes, Your Honor.

So they want to invoke, Your Honor, the covenant of good faith and fair dealing. They don't want us to point to any provision of the agreement that was in default. They want to apply an obligation onto the tenant. But the law, Your Honor, again, here in California and everywhere is clear. You cannot invoke the covenant of good faith and fair dealing to contradict express terms of the contract. And I think, Your Honor, just the case that we cite, the Storek case -- Storek & Storek case in our papers, cites to the California Supreme Court and says very clearly the scope of conduct prohibited by the covenant of good faith is circumscribed by the purpose and express terms of the contract.

We're aware of no reported case in which a Court has held that the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement.

On the contrary, the general matter implied terms should have to be read "shall never be read to vary express terms". What are the express terms here, Your Honor? The tenant has complete autonomy over its space. There's no question about that. And the landlord has an obligation to develop the plan -- a plan -- that's minimally invasive. That's on the landlord, Your Honor. And there's a provision

with the agreement that says how you do that. It's the construction protocol. It's cited within Section 8.

The landlord's one and only proposal, Your Honor, is the September letter which was an ask that Sears shut down for six months. Now even assuming that the landlord's argument to be true that there was no formal response on Sear's letterhead, Your Honor -- and I think the Sears' counsel's response speaks volumes -- they didn't get anywhere near to meet their obligations under the protocol. And if they can't meet their obligations, they cannot then somehow create an obligation not even in the contract for the tenant. Yes, Your Honor, Sears went into bankruptcy in October. No one in this room is more familiar with how busy and crazy that was, Your Honor. But that does not give them a hook to try to argue that their failure to do anything under the contract provides a burden on the tenant.

And more importantly, Your Honor, the idea that they were ready, willing and able to do this, the contract, the amendment, was signed at the end of 2015. The testimony in the deposition record, Your Honor, is that the landlord didn't even begin to look for construction financing until June of 2018. They didn't pull the permits until February 2019. Your Honor, if this project doesn't go forward, it's not because they didn't get a letter back on Sears' letterhead that says we're not shutting for six months, Your

Honor.

The landlord can't use its lack of prosecuting the program as a way to try to recover these costs because Sears went into bankruptcy.

And I think overarching all of this, Your Honor, is the idea that these are just speculative damages. They are. They're speculative. We've talked about the construction advance. And Your Honor's already said that -- I think made clear your view, but I would just state that how can we argue about the return of a construction estimate deposit and the work's not done? We can't. There's -- we can't. Who knows what may happen? Maybe they do some more work and there's a pipe burst and there's more dam -- we don't know, Your Honor. We can't return money until the work is done. And they admit the work is not done. And as you've already held, on the basis of the record, they certainly have not supported their claim for $322,000.

But as it relates to the seismic retrofit, Your Honor, the permits are active; they're valid. They're active today. You heard testimony from the landlord that they have control over 30 percent of the ground floor. You also heard testimony today that all they have to do is begin construction and call an inspector. That's all. That was in the deposition and it was repeated today. That's what they have to do to keep those entitlements going. So if

Your Honor, for example, will rule today in their favor and provide for a ruling, and Transform then took the lease and made that payment, nothing would stop them, Your Honor, from beginning construction on the 30 percent that they own the next day. And then those entitlements would still be valid.

THE COURT: Is there -- I saw easements from the landlord to Sears in the lease. Is there any issue as to access to the 30 percent to start construction is more of the question for -- no. For counsel.

MR. WEAVER: Certainly not in the record, Your Honor. I don't believe there is. Actually, I did ask the question on the stand, Your Honor, and the only issue was financing. That was the witness' testimony.

THE COURT: That's true.

MR. WEAVER: So, Your Honor, I don't see how you can satisfy, I think, legal arguments which are very -- I think, Your Honor, are very strong and I hope you agree. But how in the world -- and particularly, Your Honor, their deadline for cure objection was May 1st. That was the deadline of their cure objection. And there's nothing in their cure objection about the fact the project is dead. They've lost a --

THE COURT: Well, they reserved their rights to supplement it.

MR. WEAVER: They did, Your Honor.

THE COURT: And they supplemented it within two days before the final deadline. So --

MR. WEAVER: Correct, Your Honor. Fair enough.

So, Your Honor, happy to answer any more questions you may have. But that is the argument that I'm trying to present to Your Honor this morning.

THE COURT: Okay.

MR. SHOMOF: Can I stand?

MR. KUPETZ: Your Honor --

THE COURT: No. Only the lawyers get to speak.

MR. SHOMOF: No? Okay.

THE COURT: You could whisper something to him now if you want him to think about something.

(Pause)

MR. KUPETZ: Your Honor, I would indicate that while counsel said they had tried to resolve consensually cure objections, we just didn't have any discussions in terms of whether it was with Sears or Transform, there were no substantive discussions once the filing occurred although we reached out.

With respect to the construction estimate deposit, Transform incorrectly contends that the landlord has forfeited its right to that deposit. The landlord deposited $3,250,000 with Sears. The understanding was and is that that was strictly to be used for reimbursement of specified

tenant improvement construction expenses. So the evidence shows --

THE COURT: But where is that in the agreement?

MR. KUPETZ: Well, even when you look at the agreement, Your Honor, there's nothing that says --

(Pause)

MR. KUPETZ: Even in Section 25(d), Your Honor, it doesn't say what happens to the deposit if the work isn't completed. It doesn't say that it's forfeited to Sears.

THE COURT: Well, it says that the -- the second sentence says that any remaining construction estimate deposit shall be dispersed to the landlord if the landlord has done it. But --

MR. KUPETZ: Right. I'm saying if it's done, they have to disburse it to the landlord.

THE COURT: Well --

MR. KUPETZ: But it doesn't say that if it's not done, Sears -- and Sears doesn't spend the money to do the work, that they somehow get to keep the money and have some kind of windfall.

THE COURT: Well, they have the money.

MR. KUPETZ: Right. Of course, the agreement didn't contemplate that specifically and the parties modified that approach. But it was --

THE COURT: I mean, I can understand an argument,

although this wouldn't be a cure argument, that keeping the deposit and not using it to complete the construction might be an unenforceable penalty, something like that, or unenforceable liquidated damages. But that's not really a cure issue. I mean, that's how you'd normally deal with forfeit.

MR. KUPETZ: Right. But the agreement granted, in terms of the way it's written, has some ambiguities is what we would say. But it doesn't -- it's not saying that this deposit is forfeited --

THE COURT: Well --

MR. KUPETZ: -- if this work isn't done. Certainly, as set forth in the witness' direct testimony, the declaration, the understanding certainly of the landlord was that these funds were to be strictly used for the specified work.

THE COURT: Well, it says that this is -- 25, the introductory paragraph, describes the 3.25 million deposit as "to partially secure Landlord's design, repair, construction and completion obligations under this Amendment" which includes not only the four paragraphs but the whole thing including the seismic. So --

MR. KUPETZ: Well --

THE COURT: You know, it's securing it, all that work. That work -- it's clear the seismic work hasn't been

done yet. So --

MR. KUPETZ: Right. But --

THE COURT: -- to say that he would go back because it's a forfeiture seems to be contradictory to its purpose which is to secure the deposit.

MR. KUPETZ: I don't think that's really what it says because --

THE COURT: I just read it to you.

MR. KUPETZ: No. But --

THE COURT: That's exactly what it says. That's a quote. That's the purpose of the deposit.

MR. KUPETZ: But then --

THE COURT: It's a separate point you're making --

MR. KUPETZ: Okay.

THE COURT: -- I think, which is that it's unfair for the landlord to say that because their work in 3, 4, 5, 6 and 7 isn't timely done that they get to keep the deposit and they can do with it whatever they want to. But that's not a cure issue. That's potentially a liquidated damages issue. But clearly, it seems to me if they apply it to the work that should have been done and hasn't been done which includes 8, then there's no forfeiture. It secured all that work.

MR. KUPETZ: But 8 isn't covered by 25(d).

THE COURT: No. I know. But you're saying that

the landlord has a claim to the deposit. And we're not talking about the 322,000. We're talking about a claim to the deposit. And that's just not -- anyway, why would the landlord be entitled to it unless there was some sort of agreement that the deadline was waived.

MR. KUPETZ: Well, and that's certainly the landlord's --

THE COURT: I understand that.

MR. KUPETZ: And I can discuss that --

THE COURT: That's a separate point.

MR. KUPETZ: That's --

THE COURT: But when you're talking about forfeiture, it's a different issue.

MR. KUPETZ: Yeah. But that is the landlord's position that --

THE COURT: I understand.

MR. KUPETZ: -- the deadline was waived.

THE COURT: Right.

MR. KUPETZ: And it's the landlord's position that upon completion of the work, which the landlord is prepared to do, the remainder of the deposit is to be returned to the landlord.

THE COURT: Right.

MR. KUPETZ: Your Honor, in the direct testimony of Mr. Shomof, it's stated that prior to the commencement of

the case, Sears communicated with the landlord on a regular and continual basis. It wasn't just by e-mail. It's e-mail, telephone, in-person meetings -- to coordinate and request that the landlord do construction work at the premises for which the landlord was and/or would be reimbursed from this deposit. This occurred after the April 1 deadline. The testimony shows that, and states, in reliance on tenant's representations and the requests and the conduct and the performance, the landlord performed this work at the premises --

THE COURT: So you're saying it is a cure objection knowing what I've already told you that you don't have proof of the 322,000?

MR. KUPETZ: No. Well, we're saying we have a legitimate claim to get paid.

THE COURT: But you haven't given me a backup for the amount.

MR. KUPETZ: Well, they're all -- there isn't evidence that that amount wasn't incurred. I mean, the amount has been stated the landlord --

THE COURT: That's not how you prove a claim.

MR. KUPETZ: Well, the landlord's testified that this was incurred.

THE COURT: He hasn't reviewed any of the underlying documents. He doesn't know the invoices. He

didn't attach the invoices to his declaration.

MR. KUPETZ: Well, you're referring to the 322?

THE COURT: Yeah.

MR. KUPETZ: He attached the invoice presented to Sears.

THE COURT: But nothing to support it. It may well be that he could do that but he hasn't as far as a cure claim to me today.

MR. KUPETZ: No. His testimony talks about the point person at Sears, as counsel's referred to, or Dolores. Obviously, her e-mails -- they went back and forth. They continued to be involved. She was going to legal. She did talk to legal. In our view, waived any deadline. That was the understanding.

THE COURT: How is that a waiver, that e-mail?

MR. KUPETZ: Well, it's not -- we're not trying to rely just on that e-mail but that e-mail and other conduct including other e-mails that showed that work was being done and that she, on behalf of Sears, was in approval of that work and ongoing work. Shows a course of performance that, under California law, does supplement and does qualify and can modify contrary terms in a contract. And that's what occurred here.

In the legal discussion, they included it, pages 5 through 7 of the reply, if you go through that, there's the

California Civil Code provision that talks about it and then cites to the commercial code history. And in there, it talks -- in the quoted language that we have from the California Court of Appeals decision is the lengthy block quote that we put at page 6. And there's a reference in the last paragraph on that page that "Course of performance is relevant in ascertaining the meaning of the parties' Agreement and it may supplement or qualify the terms of the Agreement or show a waiver or modification of any term inconsistent with the course of performance." And that's what --

THE COURT: But the parties have already stated in their Agreement that there's a no-waiver -- spelled out how you waive. It just doesn't -- I don't see that. I don't see the basis of that point.

MR. KUPETZ: Well, Your Honor, I won't belabor it then but in our papers, and in our view, the parties did modify by course of performance --

THE COURT: Let me just go to the -- this argument.

(Pause)

THE COURT: The e-mail from Dolores acknowledges or states the fact that the deadline was not met. Right?

MR. KUPETZ: Right. And she continues on.

THE COURT: Right. So wouldn't that, at that

point -- wouldn't that point which that's obvious and she states it, be the point where there's a dispute as to what happens next?

MR. KUPETZ: No. Because they were in agreement as to what would happen next.

THE COURT: But there's a dispute as to how to go ahead because --

MR. KUPETZ: Not with respect to the construction estimate deposit, where it goes. With respect to the seismic work and other work, they didn't come to an agreement. But with --

THE COURT: But she just said you missed the deadline.

MR. KUPETZ: Right. But we -- but we're going to continue to work with you. And there's other e-mails. Here's what -- that works looks good. Keep doing it. And they came out and met in person after that, Dolores and another representative of Sears both in June and November of that year and, you know, continued to make payments following that time and to request that work be done on these elements. It was -- they only didn't finish up the ultimate work on the construction deposit portion when two things happened. First, Sears had asked to delay the HVAC. And they did delay the HVAC --

THE COURT: But --

MR. KUPETZ: -- work inside the store. They --

THE COURT: But she expresses that you've missed the deadline.

MR. KUPETZ: Right, but it's --

THE COURT: And now she's --

MR. KUPETZ: -- but she then says, "It's fine with us" --

THE COURT: I know, but --

MR. KUPETZ: -- "to go forward and" --

THE COURT: But that -- my understanding, at least, of -- any application of this doctrine is precluded if the parties are already in a dispute, because, in essence, that would force a party who wants to make the best of a bad situation to somehow have acquiesced in -- you don't want to be deemed to have acquiesced in the breach. It's antithetical to cover, in other words.

MR. KUPETZ: Well, I hear what Your Honor is saying, but I don't believe that's the way the parties were dealing with it. She never communicated to them that they were in a dispute.

THE COURT: Well, she just said you -- but she says in that email, you missed the deadline.

MR. KUPETZ: Right. But that's fine. We're going to continue to work this way.

THE COURT: Well, but that's what people do when

there's cover. You know, it doesn't mean that you've waived a breach. You could -- particularly with an agreement like this that, in essence, gives the tenant a backup, which is to direct the work yourself. Why isn't that what she was doing?

MR. KUPETZ: Well, that wasn't how the landlord understood it, but maybe that --

THE COURT: Well --

MR. KUPETZ: It could be what she was doing.

THE COURT: All right. So --

MR. KUPETZ: The landlord understood we're not in dispute. We're continuing to work on this and --

THE COURT: Well, I --

MR. KUPETZ: -- that basically the terms had been modified voluntarily by the parties.

THE COURT: Okay.

MR. KUPETZ: So it sounds like Your Honor has heard as much as you're -- besides the papers, in considering --

THE COURT: Well, I mean, the papers laid this out.

MR. KUPETZ: Yeah. So I think you've --

THE COURT: I think it's clear under California law that you can use course of dealing to explain or construe a provision of an agreement beyond parol evidence.

MR. KUPETZ: Right, and --

THE COURT: And I've -- we've discussed that in terms of the word timely. But I think that the California courts are actually quite careful in limiting course of dealing where there are contradictory provisions in the agreement, and where there's -- where those provisions have been breached. At that point, I just -- you know, to read it to say that if the parties continue to try to work out of a bad situation, the one party has waved its rights under the agreement just doesn't -- I think you need more than that.

And it -- let's go to the fundamental point, which is the proposal that she made was to tie the HVAC work to the seismic work, so they're all done together. That actually wasn't done.

MR. KUPETZ: Well, it was, in part, because part of the HVAC work didn't affect -- she was really concerned with in-store interference. Part of the HVAC work is on the roof -- that rooftop, and that's been done. That doesn't affect the store. That wasn't what she was concerned about. She was concerned about in-store access and interference. And that work hasn't been completed. That's the remaining portion --

THE COURT: Right.

MR. KUPETZ: -- because Sears hasn't allowed

access as of this point.

THE COURT: But the agreement, if you're saying there was a waiver, was to do it in connection with the seismic work, so you wouldn't have to do it twice, right? And --

MR. KUPETZ: Well, it was beyond that --

THE COURT: -- your argument is, "Well, Sears is preventing us from finishing the HVAC work, and then we'll do the seismic work."

MR. KUPETZ: But the agreement, as the landlord understood it, covered other work that was ongoing. It wasn't just that work, and there's even --

THE COURT: We're really talking about two different things. We're talking about the right to get paid for the work that was done. Okay?

MR. KUPETZ: Right.

THE COURT: I think we have an acknowledgment from the tenant that it's fair to get paid for the work that's done. It's just not under the terms of this contract, but still work that was done. On the other hand, to say that one has a right to the return of the deposit, when the remaining work hasn't been done, is a real stretch. If you're relying upon one email in May of 2017 that says, "We'd like to have the HVAC work done with the seismic work," and in fact, the HVAC work hasn't been done yet.

MR. KUPETZ: Well --

THE COURT: And the seismic work, it doesn't look like it's going to be done, ever, as far as I can tell.

MR. KUPETZ: Right.

THE COURT: Certainly not within the timeframes contemplated by paragraph 8. So her -- even if you take her email as a waiver, which I don't, the conditions of the waiver haven't been satisfied.

MR. KUPETZ: Right. But the landlord also isn't saying, and as I read our papers and as we presented them, isn't saying, "And return the full deposit to us that remains right now." It's saying --

THE COURT: That's what their claim is, it's for the full amount.

MR. KUPETZ: Well, we're saying it has to be maintained. And when we finish the work, which if you give -- if whoever is the tenant allows access, the landlord can finish the work.

THE COURT: Well, the -- one thing is crystal clear, to me at least, under the language of 25(d), the tenant has the right tomorrow to elect to take the deposit. There's no time limit on the tenant's election.

MR. KUPETZ: But it has to be devoted to doing the work for the property. I don't think they have the right to just take the deposit --

THE COURT: Again, but that's not a cure issue. That's not a cure issue. They're not proposing to just keep it? Logically, they apply it to the property, but that's not a cure issue. But it doesn't say that they have to segregate it. It just says they take the money. They can have it.

You can argue in the future that it would be a windfall, or an improper liquidated damages provision, or putative damages if they don't apply it to the -- finishing the work, but you know, a) you'd have to win that; and b) it's not a cure objection today.

MR. KUPETZ: And is it a claim against --

THE COURT: No, it's not a claim. There's no claim. They have -- look, I mean, paragraph 25, your client's main point is that they didn't elect to keep the money. Well, but they can elect tomorrow. There's no time limit on it.

MR. KUPETZ: But meanwhile, they had the client do --

THE COURT: Well, all right, but that's -- again, that's not a -- I don't view that -- I view that as they could've hired, I don't know, some other HVAC person to do that work. And in fact, the landlord hired an HVAC person, right? He didn't do the work himself. So yes, you have to pay for the work you do. I have no idea whether -- what

that amount is. It may be considerably less than 322,000. It may be 322,000. We don't know. But you know, it's hard for me to imagine that some Court would dispute that if, in fact, the landlord can show that it paid valid invoices by people who did valid work, and after it's completed, and specified, and approved, such approval not to be unreasonably withheld, they wouldn't be paid for.

MR. KUPETZ: But --

THE COURT: But that's not a cure objection.

MR. KUPETZ: But is that claim against old Sears?

THE COURT: No. No. Because it's -- well, I don't know. That's a good question. That's a very good question.

MR. KUPETZ: Because otherwise, we're allowing a windfall.

THE COURT: Yeah, well, all right. But it may not be a cure objection. But again, I don't have any proof of it today. So I think you're better off having it be a cure objection -- I mean, a quantum meruit claim for the work that was done.

MR. KUPETZ: Does Your Honor want to hear any other arguments in terms of the failure of the project, or does the Court want to just --

THE COURT: Well, I mean, I don't -- I mean, that's the step -- that's the other issue. We've been

talking about the deposits so far. But as far as the consequential damages claim for the apparent, or the asserted inability to get the financing to do the work to complete the project, it's agreed, right, that there's no obligation -- express obligation under the contract to comply with that, right? To do that?

MR. KUPETZ: That's correct, Your Honor.

THE COURT: So when Mr. Shomof testified that the financing was pulled because there was a condition that there be an agreement with Sears, the agreement was the lease, the 2015 lease. There was an agreement.

MR. KUPETZ: Not --

THE COURT: Right?

MR. KUPETZ: What he was talking about was there need -- and I can run through this, if it's helpful.

THE COURT: Okay. But that's how I'm looking at it. I mean, it's hard to see --

MR. KUPETZ: There needed to be --

THE COURT: I'm getting -- I'm ultimately getting to what I think a business person might understand, which is I don't -- we could walk through all the terms of the agreement, but ultimately, if those terms don't permit what the landlord proposed, it's clear to me that when the bank put a condition that there be an agreement with Sears, it meant a new agreement, because the existing agreement didn't

provide for it.

MR. KUPETZ: Right, they were --

THE COURT: And there's no obligation on Sears' part to provide a new agreement. So I don't see how there could be any damages for Sears in terms of pulling -- you know, in terms of the bank financing being pulled. So we have to look at the agreement.

MR. KUPETZ: Well, and we're seeing it's not -- it's really based on an implied covenant of good faith and fair dealing.

THE COURT: Well, I understand. But if the agreement itself -- the implied terms cannot vary the terms of the agreement, of the contract. So the part -- I mean, this contract -- the 2015 contract is very clearly contemplating this work to be done, and it has a whole section, the construction protocol. It lays it all out what needs to be done, as well as the operative paragraphs that incorporate the protocol.

MR. KUPETZ: And in our papers, we tried to address some of that. I don't know if the Court wants me to summarize that and go through it.

THE COURT: Go ahead. I mean, I don't see how this letter from September of 2018 came close to satisfying those conditions.

MR. KUPETZ: Well, let me -- maybe -- if the Court

will allow, I'll walk through it.

THE COURT: Okay.

MR. KUPETZ: And hopefully, it advances the cause.

THE COURT: Okay.

MR. KUPETZ: Prior to Sears entering Chapter 11, the landlord was in the discussions with Sears regarding plan rehabilitation and redevelopment of the building.

THE COURT: Right.

MR. KUPETZ: And that's set forth in paragraphs 39 through 50 of Ms. Shomof's declaration, ECF 4625.

THE COURT: Right.

MR. KUPETZ: There were communications with Mr. Velkei, who was one contact, a lawyer out in California that the landlord had for Sears. There's the letter that the Court referred to, the 9/25/2018 letter, which did propose closing the store for six months. That was in the landlord's -- neither a requirement nor a demand.

They didn't get a substantive response refusing it, and they just couldn't get any engagement from Sears at all after the Chapter 11 filing. Page 45 -- paragraph 45 in the Velkei -- or in the Shomof declaration referred to -- talks about how Mr. Velkei advised him to contact Sears bankruptcy counsel. There was a letter actually from myself to the Debtor's counsel, which was Joint Exhibit 12.

THE COURT: But -- could I interrupt you?

MR. KUPETZ: Uh-huh.

THE COURT: Because this goes through what's in your pleadings. And let's assume all of that is true, the lease amendment has a specific section dealing with seismic work. It has certain deadlines in it. And then it says, "The plans and specifications schedule authorized hours of construction activity and remediation plan for set seismic work shall be preapproved by tenant, pursuant to the demolition and construction protocol attached hereto as Exhibit C, and conducted," that's the next step, "conducted in a manner that creates the minimum possible visual and noise inconvenience to tenant and its customers."

So then you go to Exhibit C, the demolition and construction protocol, and 2(b) -- Section 2(b) states, "Landlord shall provide two weeks' notice for any demolition or construction work not involving remediation or removal of hazardous materials of the building parcel, and shall include in that notice the scope of work contemplated, a detailed set of plans and specifications for the same, together with the schedule of authorized hours of construction activity and remediation plan for the same. Tenant shall have ten business days from receipt of landlord's both notice and complete detailed plans of specifications to provide any comments and/or objections. No reply from tenant within that period shall constitute

approval. Landlord may proceed with the work in question after complying with the aforesaid procedures, provided the work in question is approved by tenant or deemed approved by tenant as aforesaid."

And then (c) deals with if tenant lodges timely objections, "The parties hereto must agree upon the scope and course of the work, together with the schedule, authorized hours of construction activity, and remediation plan for the same before it may proceed. Such consent by tenant may not be unreasonably withheld."

So it appears quite clear to me that A) the landlord did not provide the type of proposal -- details, set of plans, specifications, et cetera, that would -- in the September letter, that would start the ten day clock ticking. And it may have been, as a business person, reasonable to assume that he could ignore that and just discuss things, and try to work from a baseline, which he knew was clearly unacceptable, to something that would be acceptable. But that didn't happen.

So I think it would then be incumbent upon him when he wasn't getting any more response than the initial response he got back, which was arguably a no, although it was a no to something that didn't really need to be responded to under this Section 2(b), because it was responding to something other than a 2(b) type of proposal.

But if he wanted to bind Sears in the face of silence, he had a means to do so. He could make that type of proposal. And if there was no response within ten days, it's deemed accepted. The affidavit says that never happened, and it's not really Sears' fault.

MR. KUPETZ: It's correct that didn't happen. Realistically, as the reply does discuss, it's really an illusory kind of provision, because --

THE COURT: It's a highly detailed provision.

MR. KUPETZ: But without --

THE COURT: The parties entered into a separate multi-page -- I mean, a 36 page amendment to their lease, contemplating all of these things, with then a lengthy Exhibit C protocol. It couldn't be more detailed. And when you compare it to the provision in a lease that basically gives the landlord to terminate for any reason, including its own financial gain, which the California courts say is perfectly acceptable and rules out any breach of the implied covenant of good faith and fair dealing, it's hard to see how you could somehow say, "Oh, no. The parties did specify all of this, but we can just make a proposal and then somehow bind the debtor to having to front all of our financing and construction costs." This just doesn't really fly.

MR. KUPETZ: But in the real world, as Mr. Velkei

said in his response, the very last line of his response. "In order for this project to move forward, there's got to be collaboration." And there's --

THE COURT: In the real world, parties write agreements that they live up to. This agreement spelled out what was to happen. If there's a non-cooperating party, you give it your best shot to comply with the requirements of 2(a). And frankly, at that point, the non-responding party is at real risk. You know?

I mean, if there are details that they could have negotiated, but the non-responding party, Sears, lets it go, they're stuck with it. There's an implementation feature. You know, that's 2(c), but they're stuck. Didn't happen. You know, it's -- I appreciate business people think differently sometimes than their agreements, but the agreements governed, unless they're waived. And there's no waiver here, this issue.

MR. KUPETZ: It sounds like the Court has seen the papers and doesn't want to hear argument.

THE COURT: Yeah. Your papers are pretty clear on this at this point.

MR. KUPETZ: Any other questions, Your Honor?

THE COURT: No, I don't think so.

MR. KUPETZ: Thank you, Your Honor.

THE COURT: Okay.

MR. WEAVER: Sorry, Your Honor. I just need to make clear, and forgive me -- indulge me for one moment. Just so we're -- I know Your Honor wasn't ruling on this point, and it's not before Your Honor, but to be clear that my client, Transform, is responsible for the cure obligations of any contract that it assumes and assigns --

THE COURT: Right.

MR. KUPETZ: -- there's not -- that was agreed to as part of the APA, there's nothing before the Court today, Your Honor, about any other type of damages that might be owed to this landlord --

THE COURT: No, I agree.

MR. WEAVER: -- and who would be responsible for that.

THE COURT: Well, that's fair. But I think, to be clear, I'm also not authorizing in a ruling here that denies the landlord's cure objection as to return of the deposit, that shouldn't be taken to mean that Transform is authorized to just take that deposit and put it to general uses.

MR. WEAVER: Understood, Your Honor. That was not at all how I understood Your Honor to speak, but I just wanted to make clear that that Transform's obligations are limited here, Your Honor, to cure amounts that we're discussing.

THE COURT: That's right.

MR. WEAVER: Nothing further from Transform, Your Honor.

THE COURT: Okay. All right. Sears Roebuck was party to a 2011 lease, which was amended and restated in a December 30, 2015 lease of an interest in real property located at 10309 Folsom Boulevard. No, I'm sorry. Is that the location? Well, let me just say in Los Angeles.

MR. WEAVER: Olympic Boulevard, Your Honor.

THE COURT: Olympic Boulevard. In Los Angeles. Consistent with prior orders that I have issued in this case, Sears sent out a notice of proposed assumption and assignment of the lease to Transform Holdco. That notice -- that set of notice procedures gave the landlord the opportunity to object to the assumption and assignment, and/or to assert that there were outstanding obligations under the lease, i.e. that there were defaults under the lease, that created a monetary obligation on behalf of the tenant to be cured under Section 365 of the Bankruptcy Code.

The agreement between Sears and Transform lays out who's responsible for that cure. But the key point for my ruling today is that cure is only owed in respect of monetary obligations for defaults before the assignment of the lease, including prepetition defaults.

The landlord here asserted three sets of defaults, two of which the assignee, Transform, has agreed are, in

fact, properly owed cure amounts, or that will be properly owed in the case of tax reimbursements, in the amounts asserted. So there's no remaining dispute between the landlord and Transform, which under the agreement with Sears, would be responsible to pay such cure with respect to the common area maintenance or property tax reimbursement cure amounts asserted in the landlord's objection.

In addition, the landlord's cure objection raised two other cure issues. And I find that both of the cure claims or both of those cure claims, although one was asserted in a supplemental cure claim, were timely made.

First, the landlord refers to the remaining amounts in a so-called construction estimate deposit, established under Section 25 of the 2015 amended and restated lease, which was established originally in the amount of $3,250,000.

And parties agree that substantial amount -- a substantial amount of that sum has already been paid out of such deposit. The landlord contends that in respect of work that it did, or its contractors or subcontractors did, in the sum of $322,649.80 is due and owing to the tenant to be paid from the remaining amount in the construction estimate deposit.

Secondly, it contends that it would be a breach of the lease if the landlord did not use the remaining amount

in the construction estimate -- I'm sorry, if the tenant did not use the remaining amount in the construction estimate deposit to reimburse landlord for construction expenses at the premises, presumably in the future.

Secondly, the landlord stated in its original cure objection that there was an immediate need to make extensive renovations at the property as part of an overall rehabilitation plan to develop the property, which is only 70 percent occupied by Sears.

And to conclude, work that under paragraph or Section 8 of the 2015 lease, with respect to seismic work, needed to be work in a supplemental -- a timely supplemental objection. The landlord asserted a multi-million dollar claim based on the alleged breach by the debtor tenant of its implied covenant of good faith and fair dealing under the lease, allegedly because the tenant did not reasonably respond to or cooperate with the landlord in permitting the landlord to do such work.

That multi-million dollar figure was comprised of cost that the landlord stated it had incurred to lay the groundwork for that work, and/or the failure allegedly attributable to the debtor of the landlord's financing to commence such work.

The first set of issues depends upon, in the first instance, a construction of the 2015 amended and restated

lease, which was entered into, as stated in the recitals, in part because additional work was contemplated on the building and the -- I'm sorry, the parties "had a number of issues to dispute," with respect to the terms of the 2011 lease. That prompted the parties to enter into the amended restatement.

The 2011 lease provides in Section 2(a)(3), "The parties acknowledge that it is most critical to the successful operation of tenant's business at the premises, the tenant has access, use, and enjoyment of those portions of the building parcel shown on the site plan as 'tenants control the area,'" including such rights as are set forth below.

"Without tenants' prior approval, which may be withheld for any or no reason in its sole discretion, landlords shall not construct or install any improvements, or make any changes to tenants' control area, or interfere with, or obstruct tenants' use thereof in any manner whatsoever, including without limitation by reconfiguring the parking spaces."

The 2015 amendment and restatement acknowledges that additional work will be done and sets forth the parties' agreement in connection with that work. Section 2 of the document begins with an unlettered paragraph by stating that, "Landlord at landlord's sole cost and expense

shall design, construct, and complete all work contained within this agreement in compliance with the demolition and construction protocols attached hereto, and made a part hereof as Exhibit C, including without limitation, work described below in Sections 3, 4, 5, 6, 7, 8, 10, and 11, subject to the terms of Section 9 below, on or before April 1, 2017, unless a different completion date is explicitly set forth below, in which case the different completion date set forth below shall govern, or unless the date is otherwise amended in writing by means of a further amendment to this agreement.

"Final plans and specifications shall be reviewed and approved by tenant pursuant to the demolition and construction protocol, even if the work in question is addressed in the exhibits attached hereto."

Paragraphs 3 through 8 and 10 all lay out work with respect to specific projects. In order: low voltage service, HVAC, plumbing, façade, signage, seismic work, and freight elevator work, which are all, as I noted, referenced in this section that I quoted.

The agreement not only has an integration provision in Section 19, but also has a no waiver provision, Section 17, which states, "Unless expressly waived or released in either the building lease, or in this amendment, or in a separate writing signed by the waiving party, no

provision of either the building lease or this amendment shall be deemed to be a waiver by either party of any rights or claims against the other, either arising out of the building lease as amended, or out of any other agreement or circumstances."

It is undisputed that the specific work to be done or completed under paragraph 2 was not done -- to be done by April 1st, 2017, was not in fact completed by April 1st, 2017. This is relevant to the claim for the $322,000, as well as to the assertion that the money currently being held as part of the construction estimate deposit needs to remain to be held in that deposit and paid to the landlord under the terms of the agreement.

Paragraph 25, as I noted, provides for the establishment of the construction estimate deposit. It is -- it was funded by the landlord as set forth in that provision, "To partially secure landlord's design repair construction and completion obligations under this amendment," i.e. that landlord's obligation to complete the work.

The agreement went on to establish -- to provide that tenants shall, in turn, within a reasonable time thereafter, but in any event within 30 days of landlord's written request, deposit that money in escrow "to enable able landlord to be able to draw upon those funds in the

construction fund escrow to pay for landlord's design repair construction and completion work, as required per this amendment."

However, the parties have agreed that the funds would be held by the landlord. In other words, the escrow was never set up -- I'm sorry, held by the tenant. In other words, the escrow was never set up by the tenant and the landlord never requested the establishment of an escrow.

And it is agreed that a substantial amount of those funds were, in fact, used to pay or reimburse the landlord for work that it did under Section 2 through 10. Of particular relevance to the first remaining dispute is Section 25(d) of the lease, which states, "In the event landlord does not complete the work contemplated in Sections 3, 4, 6, and 7 by April 1, 2017, the remainder of the funds in construction escrow shall be released to tenant at tenant's election, so that tenant can cause the work to be completed, and tenant shall be entitled to payment by landlord any additional amounts necessary to complete the work."

Paragraph 25(d) then goes on to state, "Upon landlord's completion of the work described in Sections 3, 4, 5, 6, and 7 in a timely manner, and its inspection and acceptance by tenant, any remaining construction and estimate deposit fund shall be disbursed to landlord,

subject to the review and approval of the parties regarding the amount in question."

As I noted, it's undisputed that the work required by Sections 3, 4, 6, and 7 was not completed by April 1, 2017.

It's also disputed that, as of today, the landlord has not made an election to have the remainder of the funds released -- I'm sorry -- the tenant has not made an election to have the remaining funds released to the tenant so that the tenant can cause the work to be completed.

(Pause)

THE COURT: There is no time limitation, in the agreement, on when the tenant may make such an election, however. So, conceivably, the tenant could make the election tomorrow given the landlord's failure to complete the work in Section 346 and 7 by April 1, 2017.

The landlord contends, however, that the parties modified the deadline set forth in the first sentence of Section 25(d) by its course of dealing or their course of dealing.

The facts to support that contention are two-fold. First, there are some invoices with backup in the record showing 14 payments for work done by the landlord after April 1, 2017, apparently on these -- one or more of these four projects. Those required to be completed by the

landlord under Section 346 and 7 of the 2015 amended and restated lease.

Secondly, there is a May 2017 e-mail from a Sears real estate employee to the landlord which states or points out to the landlord that the landlord has not met its deadline to complete that work by April 1, 2017 and then goes on to state that Sears would be prepared to have the remaining A track work done later in tandem with the seismic work required under paragraph -- or Section 8 of the agreement to avoid two sets of disruption of Sears's operations.

(Pause)

THE COURT: It is reasonably clear to me that Sears and the landlord were aware of -- that the landlord continued work after April 1 and that Sears was aware of it. What we do not have is a signed written waiver as required by Section 17 of the 2015 amended and restated lease.

(Pause)

THE COURT: The landlord contends that the cure claim for the 322,000 and change is not a default under the lease and it's not being paid out of the construction fund escrow because of the release feature of the first sentence of paragraph 25(d) and the fact that the landlord doesn’t have the right to the release of any remaining funds in the construction fund escrow because there would not a

construction fund escrow and/or because the work has not been completed in a timely manner as required in the second sentence of that section.

I construe the first sentence of Section 25(d) to provide that the funds in the construction escrow fund could be released to tenant upon the tenant's election given the failure to complete the work.

The election, in fact, has not occurred but in equal amount the work was not completed by the dates required; not only in paragraph 2(d) but also in paragraph 25 and Section 2.

(Pause)

THE COURT: Given the failure to complete the work by the time required, I believe that there is no contract right to its payment.

On the other hand, there may be a quantum meruit right to its payment and there may be well a right as a quantum meruit matter to be paid out of the construction fund given paragraph 25's statement that the fund was required to partially secure the landlord's completion of the work albeit that it was to be completed under the terms of the agreement.

But it is clear to me that there is no cure claim per se for the 322,000 because the work was not, in fact, completed by the time that Section 2(a) requires it to be

completed.

Again, this doesn't preclude a quantum meruit claim and it doesn't preclude a claim that the funds that were held in escrow should be devoted to pay the amount.

But, as far as a cure objection is concerned, there is not cure obligation.

There is no present monetary default under the contract.

As pertains to Section 25(d) that leaves the landlord's other contention which is that there is a breach of the contract that needs to be cured if the tenant does not apply the construction estimate deposit to the work, not only done, but to be done by the landlord under the agreement.

(Pause)

THE COURT: I will note that the landlord does not say that he's entitled to a refund of the remaining deposit today nor could it because the work has not been completed as required by the second sentence of paragraph -- or Section 25(d).

The contention as a cure objection really doesn't apply. It assumes a hypothetical that clearly hasn't occurred at this point.

The landlord must accept that, because it's a premise of its own argument, that the tenant has not yet

elected, under the first sentence of Section 25(d), to have the construction fund released to it, to the tenant. It is still, therefore, being held and, as provided in that first sentence, if such an election is made, it shall be made "so the tenant can cause the work to be completed to whoever the tenant chooses to have complete the work."

The dispute as to what happens to any residual amount is not a cure dispute. It's a dispute for the future. Consequently, that aspect of the landlord's cure objections also should be denied.

(Pause)

THE COURT: In summary, then, let me be clear. In addition to denying both of those aspects of the landlord's cure objection, the record should be clear that I have not decided what, if anything, the landlord's entitled to be paid for work it has already done. It has not set forth sufficient evidence in the form of backup to support its invoice of 322,000 for that work. Moreover, it has not completed the work by the deadlines stated.

(Pause)

THE COURT: So, I could not, even if there were a quantum meruit issue before which there isn't since that would not be an issue under the contract, determine what on a quantum meruit basis the landlord might be owed.

Secondly, I have not determined whether if such a

claim is ever fixed the construction fund escrow can be a source of payment for it. I just noted the possibility as it may exist either under the introductory paragraph to Section 25 or the operation of the first sentence of Section 25(d).

The landlord has contended that the May 2017 e-mail and the fact that a relatively small amount of money was paid for work done after April 1, 2017 by it or its subcontractors should, as a matter of course of performance or course of dealing under California law, which the parties agree controls this dispute as far as contract interpretation is concerned, meaning that the tenant waived its rights to completion by April 1 and, therefore, that it has a cure claim.

California generally follows the plain meaning rule and excludes the admission of parole evidence particularly for only -- excuse me, but that is the case here, where there is an integrated written agreement which, as I noted before, this agreement is.

And the parol evidence rule itself can be used only to resolve an ambiguity in an agreement and this agreement is not ambiguous as far as the deadlines that it sets for performance.

(Pause)

THE COURT: The California courts, however, will,

under certain circumstances, permit consideration of the parties' course of performance of an agreement which is with respect to a transaction that involves repeated occasions for performance by a party and the other party with knowledge of the nature of the performance and an opportunity for objection to it accepts the performance or acquiesces in it without objection.

Clearly, evidence of a course of performance is admissible if it does not directly contradict the terms of a written agreement but merely explains or supplements them.

(Pause)

THE COURT: A more difficult issue is whether the course of performance actually permits modification or alteration of the plain terms of agreement, of an agreement, if an actual waiver is not shown.

And, here, no waiver would be shown given the express no waiver provision term or the express term limiting the nature of a waiver in paragraph 17 of the agreement.

(Pause)

THE COURT: As far as the deadlines are concerned, I do not believe that the parties' course of -- the evidence of the parties' course of performance is sufficient to overcome the plain terms of the agreement as to when the work was to be completed.

The payment of a relatively small number of post-April 1 work invoices, or invoices for work done post-April 1, to me also does not reflect more conceivably then the tenant causing work to be completed after the deadline passed which Section 25(d) specifically permits the tenant to choose any party to use to complete such work, including, without limitation, the landlord.

That leaves the May e-mail which acknowledged the default to not acquiesce in it but did request, in the light of the default, completion of the HVAC work in connection with the seismic work to avoid additional disruption. That was in May of 2017.

The seismic work has yet to start. To me, that is not sufficient evidence of the course of performance to show that the parties agreed to waive the April 1 deadline.

(Pause)

THE COURT: The second dispute, as I noted, pertains to the landlord's contention that the tenant breached the implied covenant of good faith and fair dealing that exists in every contract governed by California law, including lease agreements.

I guess before I go to that, let me cite Lennar Mare, M-A-R-E, Island v. Steadfast Insurance Company, 176 F.Supp 3d. 949, Ed. CA 2016, as the source for my summary of California law on contract interpretation, use of parol

evidence, resolution of ambiguities and course of performance.

That case has an extensive discussion of all of those issues citing substantial California law opinion.

(Pause)

THE COURT: So, the implied covenant of good faith and fair dealing clearly exists in all contracts governed by California law including leases, Wolf v. Walt Disney Pictures and Television, 162 Cal App 4th, 1107, Cal App 2008.

There are serious limitations on it, however, as noted by the Wolf Court "the implied covenant will only be recognized to further the contract's purpose. It will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself."

The general rule regarding the covenant of good faith is plainly subject to the exception that the parties made by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing.

This principle is consistent with the general rule that implied terms cannot vary the express terms of a contract.

If the defendant did what it was expressly given

the right to do, there could be no breach.

Thus, although it has been said, the implied covenant finds particular application in situations where one party is invested with a discretionary power affecting the rights of another if the express purpose of the contract is to grant unfettered discretion and the contract is otherwise supported by adequate consideration that the conduct is, by definition, within the reasonable expectation of the parties and can never violate an implied covenant of good faith and fair dealing.

The reference to reasonable expectations is important. I'm sorry. See, also, Storek & Storek v. Citi Corp Real Estate, Inc., 100 Cal App 4th 44, Court of Appeals Cal 2002.

The requirement of reasonableness or reasonable expectations is important to the implication of the implied covenant in the context where there is no express agreement governing the parties' expectations.

Even there, the burden that the implied covenant would place on the party against which it is being asserted must be reasonable. See Sachs v. Exxon Co., U.S.A., 9 Cal App 4th 1491, Cal App 1992.

Here, as I noted, the 2015 amended and restated lease was entered into by the parties in light of anticipated substantial work to be done on the building

including, without limitation, as set forth in paragraph 8 of the agreement, seismic work.

That paragraph says landlord is responsible for all necessary seismic repairs and improvements within and in the vicinity of the premises and the overall building.

The landlord shall use best efforts to obtain necessary government approvals to perform such seismic repairs and improvements within 12 months after the City of Los Angeles's approval of administrator's determination of the city applications described in Recital D of this amendment and complete such seismic repairs and improvements within 12 months of when said permits are issued subject to the terms of Section 9 below.

As an aside, that Section 9 prohibits work over the specifically laid out Christmas sale season.

Section 8 then continues; notwithstanding anything contained herein to the contrary, all seismic permits and seismic repairs and replacements shall be applied for, installed and completed within such time as required by law of by governmental authorities.

The plans and specification schedule, authorized hours of construction activity and remediation plan for such seismic work shall be pre-approved by tenant pursuant to the demolition and construction protocol attached hereto as Exhibit C; which also, of course, was referred to in

Section 2 of the agreement.

And, then, Section 8 continues; and conducted in a manner that creates the minimum possible visual and noise inconvenience to tenant and its customers.

Turning to Exhibit P -- C, excuse me, the demolition and construction control protocol. It provides, in Section 2(b), a mechanism for the landlord to make its proposal and contemplated by Section 8, that I just quoted.

Section 2(b) of Exhibit C states landlord shall provide two weeks' notice for any demolition or construction work not involving remediation or removal of hazardous materials at the building parcel and shall include in that notice the scope of work contemplated, a detailed set of plans and specifications for the same, together with the schedule, authorized hours of construction activity and remediation plan for the same.

Tenant shall have ten business days from receipt of landlord's both notice and complete detailed plans and specifications to provide any comments and/or objections.

No reply from tenant within that period shall constitute approval.

Landlord may proceed with the work in question after complying with the aforesaid procedures provided the work in question is approved by tenant or deemed approved by tenant as aforesaid.

The landlord, I believe, acknowledges that the one written communication that is in the record, the September 28, 2018 email to Sears in-house counsel working on building-related matters with respect to this real property, did not comply with Section 2(b) that I've just quoted.

Even if that wasn't conceded, it's clear from reading the email and the attachments that it does not include a detailed set of plans and specifications together with a scheduled authorized hours of construction activity and remediation plan as required by Section 2(b) of Exhibit C.

There's nothing in the record to suggest that such a proposal was ever made.

What the landlord contends instead is that it was understood by the parties that the September 28 e-mail was a negotiating start and that Sears did not thereafter negotiate with the landlord or even after the -- even after the start of the bankruptcy case respond to the landlord when it sought to negotiate. That, the landlord contends, constitutes a breach of the implied covenant of good faith and fair dealing. I conclude to the contrary that it does not constitute such a breach. The parties have very carefully laid out, as was evidently reasonable for them to do given the nature of the 2015 amended and restated lease, how such a proposal would be made, when it would be deemed

accepted, when it would be treated as rejected and what the parties were supposed to do thereafter.

Here, there was no such proposal made in the first place. If, when faced with no response from the tenant, the landlord wished to proceed, the agreement actually gave the landlord a mechanism in which to do so and spelled out the tenant's rights and duties with respect to such a mechanism.

The landlord would make a proposal compliant with Section 2(a). The tenant would have ten days to object. And if no reply from the tenant within that period was received, the tenant would be deemed to have approved and the landlord could proceed with the work in question.

The landlord did not follow that protocol.

It's clear, further, although unnecessary for my ruling, that in response to the September 28 proposal, which clearly was not in compliance with Section 2(b) of Exhibit C, Sears responded negatively as set forth in Mr. Velkei's e-mail in the email chain.

(Pause)

THE COURT: It should be clear though, but I'll state that, that negative response did not trigger an obligation by Sears under Section 2(c) of Exhibit C which states, if tenant lodges timely objections to any notice hereunder, the parties hereto must agree upon the scope and course of the work together with the schedule authorized

hours of construction activity and remediation plan for the same before it may proceed.

Such consent by tenant may not be unreasonably withheld.

But, again, since no such proposal was made in the first place, the rejection by Sears indicates that merely the non-compliant proposal was unacceptable. It doesn't trigger an obligation, on the tenant's part, to proceed to work on a proposal with the consent not to be unreasonably withheld.

Indeed, the rejection beyond rejecting something that was non-compliant itself refers to the fact that the proposal had significant holes in it as far as laying out a detailed set of plans and specifications and timing.

So, given that fact or set of facts as laid out in the agreement between the parties, there is no implied covenant that could be breached given that the parties actually specified how to deal with this set of potential facts.

I'll also note that the contention that the tenant was responsible for the termination of prospective financing for the renovation or remediation, by the terms of the landlord's own argument, is not tenable.

The testimony was to the effect that the bank's condition was that there be an agreement with Sears as far

as the access for the seismic work and remediation.

The parties, indeed, had an agreement. The landlord didn't follow it. Consequently, what the condition required was a new agreement which Sears was under no obligation to provide either under the plain terms of the parties' existing agreements or any sort of implied covenant of good faith and fair dealing.

So, I will deny that aspect of the cure objection as well. So, I'll enter an order granting the objection as far as the first two points, CAM and tax reimbursement and deny it in all other respects.

You don't need to refer --

MS. MARCUS: Your Honor --

THE COURT: I'm sorry. I don't -- let me just finish.

You don't need to do anything more than refer to my bench ruling.

Okay. That's someone on the phone?

MS. MARCUS: Yes. Sorry, Your Honor. This is Jacqueline Marcus on behalf of Sears Holdings Corporation.

THE COURT: Yes.

MS. MARCUS: I'm reluctant to venture into this after you've spent so much time on it this morning. But I just wanted one clarification.

THE COURT: Okay.

MS. MARCUS: You said a little bit earlier that you haven't decided whether the landlord is entitled to be paid for the work it had already done and that there might be a claim for quantum meruit.

THE COURT: Right.

MS. MARCUS: On behalf of Sears, what I want to make sure of is that there's nothing in your order today that basically transfers what might have been an unsecured claim against Sears into a post-petition administrative claim because the lease is being assumed and assigned. But, from our perspective, any amounts that would be owed to the landlord would really be attributable to Transform not to the debtors.

THE COURT: Well, that issue isn't really before me. The benefit obviously has to be for the debtor, for the estate, as far as the administrative claim is concerned. So, you know -- but that issue really isn't before me. I'm not allowing any claim. In fact, I don't have any real evidence to support a claim.

And, again, although I'm not ruling on this, it does appear to me that the purpose of the agreement is to secure whatever amounts are owing. I'm not talking about the 3.25 million agreement. It's to secure whatever amounts are owing in respect to the construction. So, all of the issues would have to be sorted out.

MR. MARCUS: I -- yes. I guess from the debtor's point of view if it -- if it were going to be in a worse position as a result of the assumption than it would have been as a result of rejection --

THE COURT: Right.

MS. MARCUS: -- that would obviously be of concern to us.

THE COURT: Well, I find that -- I understand it would be a concern but I find it -- that that state of affairs would be highly unlikely given (a) the purpose of the construction fund and (b) the requirement for any administrative expense that it be for the benefit of the debtor's estate.

MS. MARCUS: Okay. Thank you.

THE COURT: You know, here this is --

MS. MARCUS: That --

THE COURT: It's construction work that benefits the building but not really Sears except, you know, to the extent that the -- it's new Sears, the landlord -- the landlord's new tenant, Transform.

MS. MARCUS: Okay. Thank you, Your Honor.

THE COURT: But I'm not ruling on that either. I mean, that's really not before me.

MS. MARCUS: I know. I know.

THE COURT: What's before me now is a cure

objection and that requires defaults under a contract given the default by the tenant in providing the services under the contract -- I'm sorry, given the default by the landlord to provide the services under the contract, I don't see a default under the contract to be paid for. Although, you know, again, that --

MS. MARCUS: Okay.

THE COURT: -- doesn't necessary mean that there isn't some other right to payment from some source.

Okay. So, you don't have to --

MS. MARCUS: Thank you.

THE COURT: -- settle that order formally but you should circulate it to counsel for the landlord as well as counsel for the debtor.

MR. WEAVER: We'll do that, Your Honor. We'll get that e-mail to you as soon as we can.

THE COURT: Okay.

MR. WEAVER: And Your Honor should note our deadline, I believe, is a week from today. So, we'll work to get the order to you --

THE COURT: Okay.

MR. WEAVER: -- before then.

THE COURT: That's fine. I -- you know, frankly, I don't know if there's any hope in doing this but I still urge the parties to try to work with each other to get the

construction going. That might be a no brainer for each side.

MR. WEAVER: Your Honor, my understanding is that the parties have reached -- Transform has reached out, Your Honor.

THE COURT: All right. Okay.

MR. WEAVER: Thank you, Your Honor.

THE COURT: Thank you.

MR. KUPETZ: Thank you.

(Whereupon, these proceedings were concluded at 1:36 p.m.)

I N D E X

R U L I N G S

E X H I B I T S

C E R T I F I C A T I O N

We, Lisa Beck, Jamie Gallagher and Pamela Skaw certify that the foregoing transcript is a true and accurate record of the proceedings.

Lisa Beck
Digitally signed by Lisa Beck
DN: cn=Lisa Beck, o, ou, email=digital@veritext.com, c=US
Date: 2019.08.05 12:00:54 -04'00'

Lisa Beck

Jamie Gallagher
Digitally signed by Jamie Gallagher
DN: cn=Jamie Gallagher, o, ou, email=digital@veritext.com, c=US
Date: 2019.08.05 12:01:08 -04'00'

Jamie Gallagher

Pamela Skaw
Digitally signed by Pamela Skaw
DN: cn=Pamela Skaw, o, ou, email=digital@veritext.com, c=US
Date: 2019.08.05 12:01:22 -04'00'

Pamela Skaw

Date: August 5, 2019

Veritext Legal Solutions
330 Old Country Road
Suite 300
Mineola, NY 11501

f

q